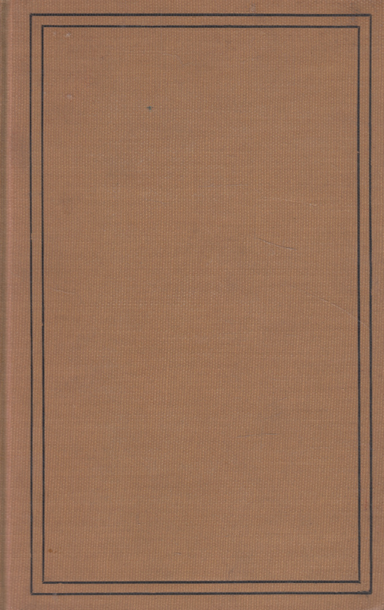












CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

JUNE 1, 1928, TO (IN PART) FEBRUARY 4, 1929

WITH

ABSTRACT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

EWART W. HOBBS

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PROCEEDINGS ON THE DEATHS OF JUDGE CHARLES B. HOWRY AND CHIEF JUSTICE STANTON J. PEELLE, RETIRED

On October 1, 1928, the court, having met according to adjournment, announced the deaths during the summer recess of Judge Charles B. Howry and Chief Justice Stanton J. Peelle, former members of the court.

Thereupon the court was addressed by members of the bar as follows:

By Mr. George A. King:

Since this court last met two of its former judges retired from active service for many years have passed away.

Charles B. Howry was born at Oxford, Mississippi, May 14, 1844. His education at the University of Mississippi was suspended by the call to arms. As a mere boy he enlisted in the Confederate Army as a private, later became an officer, and was severely wounded. When the war was over he studied law and engaged in active practice. He described the legal fraternity of Mississippi in his early days with just pride as "a bar inferior to none in its day and generation." (*Ayres* v. *United States*, 42 C. Cls. 385, 399.) In 1893 he was appointed Assistant Attorney General, and in 1897 judge of the Court of Claims by President Cleveland. He retired in 1915. His activity still continued after his retirement. He acted as chairman of a board of arbitration between twelve railroads and their employees. He passed away at the age of 84, July 20, 1928.

Stanton J. Peelle was born near Richmond, Indiana, February 11, 1843. At the outbreak of the Civil War he enlisted in the Union Army as a corporal, was soon promoted to an officer, and served throughout the war. After the war he studied law and practiced at Indianapolis. He served as a member of both the State and national legislatures. In 1892 he was appointed judge of the Court of Claims by President Harrison, and in 1906 chief justice by President Roosevelt. He retired at the age of 70 in 1913. He continued after his retirement to take an active interest in church and charitable work as he had done all his life. He also took an active interest in the cause of good government in Montgomery County, Maryland, where he resided for a number of years after his retirement. After the World War he was called back into public service as a member of the War Department Claims Board where his great knowledge of the law of Government contracts

enabled him to render valuable service in the settlement of the large liabilities of the Government arising out of the war. He died at the age of 85, on September 4, 1928.

The decisions of these distinguished judges took such a wide range during their long years of service on the bench that it is possible to mention only a few as samples of their learned and careful expositions of the law.

The opinion given by Judge Howry in the case of *Collins and Farwell*, decided in 1899 and 1900 (34 C. Cls. 294, 35 C. Cls. 122) shows his strong grasp of the principles of the law of engineering contracts. The same is true of his later decision in *Shippey* v. *United States*, decided in 1913. (49 C. Cls. 151.) These decisions carry out to their full extent the provisions of engineering contracts relating to the powers of the engineers, while at the same time adhering to those principles of eternal justice by which after all our technical rules laid down in the books must be tested.

The *Ayres case*, decided in no less than three opinions by Judge Howry, 1907 and 1908 (42 C. Cls. 385, 44 C. Cls. 48, 110) involved an intricate inquiry into the rights of Indians extending far back beyond the memory of living man. The unusual question of the power and duty of the court to give an opinion at all figured to an important extent in the decision.

His grasp of international law is shown in the opinion given by him in the brigs *Fanny* and *Hope*, decided in 1911 (46 C. Cls. 214), reexamining the whole fundamental question of the French spoliation claims. By an independent course of reasoning he announced the decision of the court as constituted at that date, the conclusions reached being identical in substance with those reached twenty-five years earlier, after the entire membership of the court had changed. (*Gray*, 21 C. Cls. 340; *Cushing*, 22 C. Cls. 1.)

Chief Justice Peelle's decisions show such a wide range of knowledge in the various fields of the law that it is difficult to make a selection.

The cases of *Matthews*, 1897 (32 C. Cls. 123, affirmed 173 U. S. 381), and *Drummond*, 1900 (35 C. Cls. 356), treat with great learning the subject of rewards for the apprehension of fugitives from justice, and have been frequently cited by text writers.

The *Borcherling case*, 1900 (35 C. Cls. 311), is an elaborate exposition of the vexed question of assignment of claims against the United States.

The *Harvey Steel Company*, 1911 (affirmed 227 U. S. 165), and the *Knapp cases*, 1911 (46 C. Cls. 298, 601), are learned and able expositions of the law of patents used by the Government.

The case of *United Engineering & Contracting Co.*, 1912 (47 C. Cls. 489, affirmed 234 U. S. 236), is one of his many able expositions of the law of engineering contracts.

The preservation of the high character of the judiciary is more than ever essential in a time of prevalent lawlessness. The Federal judicial system is constituted with a high ideal in view. A

judge when once appointed alone among all officers of the United States is secure in his tenure of office. The attempt which was made early in the nineteenth century to make impeachment the ordinary and usual method of removal of a judge obnoxious to a majority of sufficient size in the two Houses of Congress happily failed in effect. Judicial officers are alone according to a recent decision of the Supreme Court (*Myers*, 272 U. S. 52) secure from removal from their office at the will of the Executive. A judge therefore in giving his decision has no one to fear but God and his own conscience.

From the books of the Old Testament we get some high ideals of the judicial character:

"And said to the judges, Take heed what ye do; for ye judge not for man, but for the LORD, who is with you in the judgment." (II Chron. 19:6).

"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's: * * *" (Deut. 1:17.)

"Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honour the person of the mighty; but in righteousness shalt thou judge thy neighbour." (Lev. 19:15.)

The careers of the judges whom we are to-day mourning can be safely tested by the requirements I have quoted. They set a high example for the Executive to follow. While our judges remain of the standard of character and learning which so eminently distinguished these two judges, those who seek justice in this and other courts of the United States may feel well assured of both an intelligent and impartial decision on their rights.

By Mr. Charles F. Jones:

Wayne County, large in area and beautifully situated, lies on the eastern edge of Indiana, a little south of the center of the State. Within its boundaries is the source of the east branch of the Whitewater River, which wends its course southward about fifty miles through a valley famous for its beauty, and mingles its waters with those of the Miami and Ohio Rivers.

On a farm in this county there was born to John Cox Peelle and Mary Smith Peelle, on February 11, 1843, the man whose life has done honor to his county, his State, and his country; the man who was a distinguished member of this court from 1892 to 1913, and who presided over it as chief justice during the last seven years of his service; the man in honor of whose happy memory we are assembled here to-day—the lovable and beloved Justice Stanton J. Peelle.

The public schools, a seminary in his native State, and the University of Valparaiso, from which he received the degree of LL. D., were the sources from which his early education was drawn. His postgraduate course was taken in the University of Experience. As

an ardent student in this, the greatest of educational institutions, he added precious stores to his already richly endowed mind, and rose to the front rank in his chosen profession and to posts of distinction in civic, educational, and philanthropic fields of endeavor.

During his youth and early manhood he discharged the duties devolving upon him with the same devotion and fidelity as have characterized his life among us here, and with which the court, the members of the bar, and all who knew him are familiar.

When but a mere boy he answered his country's call to arms, and as corporal in the 8th and second lieutenant in the 57th Indiana Volunteers, served with honor, participating in some of the noted campaigns and engagements during the Civil War.

In 1866 he was admitted to the bar and practiced in his native State—from 1866 to 1869 in Winchester, and from 1869 to 1892 in Indianapolis; was a member of the Indiana House of Representatives from 1877 to 1879 and a Member of Congress from 1881 to 1883; was appointed judge of the Court of Claims by President Harrison in 1892, serving in that capacity until 1906, when President Roosevelt appointed him chief justice of this court; and in 1913 he retired to private life.

Notwithstanding the many years of connection with this court, it was in the capital of his own State that much of his professional life was spent; that is, from 1869 to 1892. To what extent his legal career was influenced by his early associations can, of course, not be determined. In this respect, however, he was unquestionably most fortunate, as during that period of practically twenty-five years the Indianapolis bar numbered among its members more men of distinction and national reputation than during any other period in its history—such men, for instance, as Benjamin Harrison, Joseph E. McDonald, Thomas A. Hendricks, John M. Butler, W. H. H. Miller, and many others eminent in the profession. His success in life, however, notwithstanding this environment, was due, like that of others, to his own efforts and to his splendid qualities of head and heart.

I practiced before Justice Peelle for a number of years in this court, and in Indiana our home counties of Wayne and Franklin were close neighbors, but one county intervening. I became acquainted with him while he was engaged in the practice of law in Indianapolis and know well the high esteem and regard in which he was held by his associates in the profession and by the people generally.

In one's intercourse with men, even those of irreproachable character, a doubt as to the solidity of their moral structure, a fear that in an unhappy moment of weakness they may yield to temptation, sometimes arises, but no such doubt or fear ever arose in connection with the man whose memory we honor to-day. By the clearness of his understanding, his dignity, ability, sincerity, kindliness, consideration, and purity of life he inspired absolute confidence, and not only in his professional relations, but in every activity of his busy life, he commanded the respect and won the admiration and love of

all with whom he came in contact. He had a judicial mind which always remained open until a case was closed. He was eminently fair, and his moral and judicial integrity were of the highest order and never were and never could be questioned.

True greatness lies in nobility of mind and kindness of heart as well as in illustrious deeds, and as the possessor of these qualities Justice Peelle was an illustrious example. His consideration for and interest in the welfare of others was recognized by all who knew him. In my observation and my contacts with him I was constantly impressed that the motto, "kindness and good will to all mankind," which many years ago I saw in my native State on a board over the door of the humble home of a sick man ninety years of age, whom I drove miles to see, was Justice Peelle's motto. I attended this aged man's funeral, and the outpouring of respect and love on that occasion proved that the motto hung not in vain over his doorway, and that he, like our departed friend, had spent his life in conformity with it.

> By generous, noble, kindly deeds,
> With helpful hand he sowed good seeds—
> The seeds that grow and fruit each day
> And help his brothers on their way.

Persistent in the practice of Christian virtues, indefatigably industrious, devoted to duty, warm of heart, he was an

> Exemplar of the nobler life,
> Above all petty things and strife,

and so big that were flaw or error found in his judgment or conclusions they were gladly acknowledged and corrected—an attribute of real greatness.

In his case retirement did not mean idleness, but rather increased activity for the moral, spiritual, and material betterment of his fellowmen.

By Mr. Percy M. Cox:

The passing of a profound intellect and a great soul always brings a feeling of sadness. It is no easy task to find fitting words with which to express one's sorrow.

For ten years prior to 1915 it was my privilege to appear before the court in the presentation of cases while Judge Howry occupied a seat upon the bench. Since his retirement in 1915 it was also my pleasure to speak with Judge Howry whenever I chanced to meet him upon social occasions. On the bench, in chambers, and in conversation with him, whenever and on whatever occasion, he was always the kindly, courteous, and considerate gentleman. Like the quality of mercy, his gentleness and courtesy were not strained. They were a part of him—innate and inbred.

In his judicial work he possessed a fine analytical mind and a vast knowledge of substantive and adjective law. His opinions on questions of international law arising in the disposition of French spoliation cases will stand out in the annals of this court as milestones of

judicial clarity and forensic learning. He had a rugged sense of justice and was endowed with that greatest of judicial attributes, a truly judicial temperament, a temperament which combined to an almost superhuman degree the remarkable qualities of ability, without which law can not survive; a scrupulous honesty, without which justice becomes a travesty; courtesy and patience, which begets even justice; a courage, the absence of which would threaten the very foundations of Government; and a fidelity to duty, which makes for speedy justice and consequent confidence in Government.

Judge Howry's passing has left us with a feeling of emptiness. His memory will ever remain green in the minds of those whose privilege and pleasure it was to know his worth as a scholar and a gentleman. May his spirit in the Elysian fields spread as much happiness and erudition as he did in his earthly career.

No more beautiful and fitting benediction and tribute could be rendered and paid to the memory of Judge Howry than that which he himself rendered and paid to the memory of the late Judge Lawrence Weldon on the occasion of the memorial ceremonies held in this court in April, 1905, wherein he said in concluding his eulogy:

"His written opinions are a monument to his learning, conscientiousness, and ability that will stand as long as our courts shall endure. And now that nature has called him hence in the full maturity of his splendid powers, I join the bench and bar in bidding him an affectionate farewell. If to have lived righteously and to have kept the faith, as he unquestionably did, and if the reward to the just be what we believe it is, the soul of our dead friend will rise glorious in the judgment day."

Remarks by members of the bar were concluded by the late Mr. Benjamin Carter, who spoke briefly in laudatory terms of Judge Howry, extolling his character and commending his conduct as a judge of the court.

Chief Justice Booth then delivered the following:

During the summer recess of this court we received the sad intelligence of the death of two of its former members, Judge Charles B. Howry and Chief Justice Stanton J. Peelle. Judge Howry died at his home in this city on July 20, 1928, and in less than a month and a half later the death of Chief Justice Peelle, his former associate in many years of service, occurred. Chief Justice Peelle and Judge Howry were near the same age. Chief Justice Peelle was born in 1843 and Judge Howry in 1844. Each had a distinguished military record, Chief Justice Peelle in the Union and Judge Howry in the Confederate Army.

Judge Howry had attained a high place in the esteem and affections of the people of his native State of Mississippi prior to coming to Washington, and Chief Justice Peelle had been signally honored and respected by the people of Indiana before he became a judge. Chief Justice Peelle retired from the bench on February 11, 1913, his

seventieth birthday. Judge Howry's retirement followed on March 15, 1915. The activities and accomplishments of these two distinguished men were singularly contemporaneous. The motives which actuated them in choosing a professional career, the ability disclosed in meeting the exacting requirements of success, were decidedly parallel, and while in some respects they differed in temperament and disposition, it was my personal pleasure to observe in daily association with both that each respected and duly accorded to the other that full measure of worth to which each man was undoubtedly entitled. It would have been impossible for Judge Howry to have lived a life of indolence and repose. The happenings of the world and the times in which he lived, the policies of the Nation and the State of his nativity, the social and political problems which moved the people to action, came home to him with such conscientious responsibility that as a man and a citizen he gave to them the weight of his convictions and the force of his personal activity. Put to the painful necessity of conserving his physical strength, frequently called upon to labor under the stress of illness and pain, he with a degree of courage and fortitude never excelled met the responsibilities of life and faithfully discharged the duties of his office. In the many important positions he occupied and the wide extent of his contacts and friendships I have yet to learn of a single instance where he failed to leave the impression of a conscientious effort to do his full duty and meet the requirements of the position. Socially Judge Howry was most congenial. Whatever may have been our differences of opinion, between us as associates an unpleasant word never passed. He was absolutely without a sense of fear. No human being was ever more courageous, not a single emotion of cowardice ever controlled his movements or his convictions. On the bench and in the conference room, reflected in his opinions and in his daily life, is the pronounced evidence of his attitude toward principles which he believed to be right, conduct which he thought to be justified, and the law of the case as he after careful deliberation believed it to be. I do not mean to say that he was immune to argument or so firmly opinionated that contrary suggestions and conflicting views of his associates were summarily excluded from his considerations—to so say would be a manifest untruth. Judge Howry, like all other judges seeking to enforce the law and attain justice, frequently changed his opinion. The outstanding characteristics of the man were firmness in conclusions deliberately reached, an exhaustive attempt to deal fairly with his associates and humanity at large, a tireless effort to provide generously for his family, a never ceasing devotion to those for whom he especially cared, and a broad, enduring feeling of sympathy for his fellowmen. No subterfuge animated his conduct. His friends and the people knew exactly where to find him. Expediency could not exact of him a single compromise that demanded the forfeiture of his self-respect or the yielding of principles cautiously and carefully adopted. His was a long life of usefulness, a distinct and enduring contribution to the activities in which he was engaged and

to the profession he chose as a career. What he accomplished upon this bench is set forth in the tribute paid to him by the bar and his many friends on the date of his retirement, and will be amplified here to-day. The Court of Claims was honored by his service; and his family, friends, and associates will remember him with abiding affection and reverence.

Mankind's accomplishments are apparently measured by comparisons. The pioneers of the legal profession, the really great men who conceived the principles of jurisprudence, left to posterity the arduous task of developing political and social relationships upon the fundamental principles of restraint and established order. Generations of advocates, statesmen, lawyers, and jurists have passed in review, and history seems to accord to those who have attained eminence a relative degree of greatness arrived at by the accomplishments of distinguished predecessors. How frequently we hear that some jurist approaches the greatness of Chief Justice Marshall, some lawyer the enviable status of Choate, some legal author and educator designated a second Blackstone, so that in the end it seems, when professional ability and attainments are to be permanently allotted to one whose work is finished, we recur to the standards of the past and predicate our judgment upon that degree of success wrought out in a field of distinguished competitors and from a history replete with learning and ability.

The professional life of Chief Justice Stanton J. Peelle, appraised within the limitations of his chosen career, meets the test of wholesome and truthful eulogy and warrants, beyond peradventure, the approval of his fellowmen, and the enduring impression of real ability and accomplishment. Five distinguished jurists preceded Justice Peelle in the office of chief justice of this court. It is but simple justice to here record that he will be permanently remembered as their equal in ability, entitled to the lasting gratitude of the court, and recalled with pleasure and happiness by the members of the bar who knew him personally and enjoyed the privilege of appearing before him. Chief Justice Peelle was a robust man, endowed with the priceless blessing of good health. Exhausting illness rarely ever forestalled the exercise of his boundless industry. In all his long service on the bench he was absent therefrom for only a very few days. No one could have more conscientiously centered his attention upon his judicial duties than he. The court and its responsibilities were his chief concern, and while he found time to engage in many other activities, he subordinated all of them to the extent at least of noninterference with the proceedings of this tribunal. This event brings home to me the sad remembrance that I am the only surviving member of the court over which Chief Justice Peelle so ably presided. For eight years we were not only officially associates, we were friends. No human being could have come in daily contact and intimate association with Justice Peelle for so long a period and escaped the formation of an admirable friendship and an enduring respect for his exalted character and

engaging personality. As presiding justice of this court he was courteous, patient, dignified, and just. As a judge he was industrious, conscientious, and temperamentally adapted to the important duties of adjudicating the legal rights of the citizen and the Government under which he lived. He was possessed of that somewhat rare characteristic, a most noble one, of combining an intense degree of positiveness with a graceful mannerism, a polite and gentlemanly method of expression and contact, indexing his sincerity, and at the same time excluding an unfavorable impression of intolerable opposition to his established views. His was a kindly and generous disposition. Misfortune appealed to his sympathies, and while not a man of wealth, he contributed most generously to the needy and to Christian institutions, which he recognized as serving a benevolent and Christian purpose. Devoted to his family and his friends, thoughtful and considerate of others, he builded for himself throughout his long life a name and reputation that will survive, and leaves to this court, his family, his friends, and the world the permanent legacy of an honored name, a useful life, an upright and efficient judge, a worthy and exceptional citizen of the Republic, a just and Christian gentleman.

The members of the bar and his friends on the date of his retirement, as in the case of Judge Howry, paid him a merited tribute of respect and admiration. What was then said reflects the volume and character of his services while a member of this court. What is said to-day, and the proceedings of the hour, emanate from a sincere desire to spread upon the court's records a final memorial to the memory of Chief Justice Peelle and Judge Howry, two preeminent members of the court, each of whom won the esteem and friendship of both the court and the bar. Two long and useful lives have ended. What a comfort it must be to those who were nearest and dearest to them to know and to experience the commendation of their fellowmen, realize the character of their worth, and the extent of their affectionate regard.

As a final tribute to their memory, the court enters an order that the proceedings of the day be spread upon its records, and the reporter of the court is directed to include them in the next volume of our annual report. It is so ordered.



ORDER OF THE COURT RELATING TO THE RETIREMENT OF CHIEF JUSTICE EDWARD K. CAMPBELL

NOVEMBER 2, 1928.

In May, 1913, Edward Kernan Campbell, of Birmingham, Alabama, was appointed by President Wilson chief justice of this court. During a period of fifteen years Chief Justice Campbell gave to this court a degree of industry and devotion which has never been excelled. Through his daily persistence and tireless energy the docket of the court was brought to the enviable point whereby litigation in the court was expeditiously disposed of and long and tedious delays eliminated. A number of most commendable reforms in procedure were inaugurated at his suggestion, and to the subject of the prompt dispatch of the court's enormous business he gave most intelligent consideration and labor. In addition to the great volume of executive duties he was called upon to perform, vastly increased by the late war, Chief Justice Campbell accomplished, at the expense of late hours and exacting labor, his full portion of the court's opinions, and leaves behind him a distinguished record for ability and fairness.

On April 17, 1928, the chief justice retired. His associates regretted his going. In our daily contacts we found him pleasant and agreeable, a man worthy in every respect of the position he occupied, and one for whom we wish continued good health and happiness.



LEGISLATION RELATING TO THE COURT OF CLAIMS

"(*a*) Section 177 of the Judicial Code, as amended, is amended to read as follows:

"'Sec. 177. (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

"'(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.'

"(*b*) Subsection (*a*) of this section shall take effect on the expiration of thirty days after the enactment of this Act."—Section 615, act of May 29, 1928, 45 Stat. 791, 877.



CASES DECIDED

IN

THE COURT OF CLAIMS

JUNE 1, 1928, TO (IN PART) FEBRUARY 4, 1929.

J. & J. W. STOLTS ASSOCIATION v. THE UNITED STATES

[Nos. D-800 and D-801]

On the Proofs

Contract; extra work; quantum meruit; lack of authority in Government agent.—In suit to recover from the United States on the basis of quantum meruit for work performed and labor furnished over and above that required by express contract, want of authority in the Government agent to act in the premises precludes recovery.

The Reporter's statement of the case:

Mr. Camden R. McAtee for the plaintiffs. *Messrs. Mark Eisner* and *Irwin M. Berliner*, and *Mason, Spalding & McAtee* were on the brief.

Mr. W. F. Norris, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Decided April 2, 1928. Motion for new trial overruled October 8, 1928.

The court made special findings of fact, as follows:

I. The plaintiff is a joint-stock association with corporate powers duly organized and existing under the laws of the State of New York, with its principal offices and place of

business in the city of New York, and is engaged in the business of manufacturing and selling caskets and coffins.

II. During the years of 1919 and 1920 the plaintiff entered into three successive contracts with the United States for caskets for the Army overseas dead. The manufacturing specifications in each of the three contracts were essentially the same.

The first contract, No. 1343–N, was dated December 10, 1919, and was for 6,000 caskets at a unit price of $62.50 each "*f. o. b. factory, New York City, N. Y.*"

The second contract, No. 1389–N, was dated April 16, 1920, and was for 10,000 caskets at a unit price of $87.50 each "*deliveries f. o. b. New York.*"

The third contract, No. 1404–N, was entered into in September of 1920, and was for 12,000 caskets at $106 per casket, deliveries to be made "*f. o. b. cars.*" These contracts as modified by changes of specifications and increases of unit prices were all fully performed and the contract prices specified were fully paid to the plaintiff company.

These two contracts were modified by changes in the specifications and decreases and increases in the unit prices. Contract No. 1343–N was modified by a supplemental contract dated March 4, 1920, decreasing the price by one dollar. This contract was again modified under date of April 26, 1920, by increasing the unit price on 2,000 caskets by $3.85. Contract No. 1389–N was modified by supplemental agreement dated May 6, 1920, increasing the unit price per casket by $7.35.

The plaintiff fully performed these contracts as modified by changes and periodically as it made deliveries, signed vouchers, and received payments therefor. Throughout this period the plaintiff made no claim of any kind to be compensated under either of these two contracts for any alleged additional expense for moving the caskets from the factory and loading them on the barges, which were located about two hundred feet from the factory door. The loading of the caskets on barges was commenced on March 10, 1920. The first written claims made by the plaintiff were on July 3, 1923, which claims were disallowed. The arrangement to

deliver the caskets under the first contract on barges rather than on Government trucks at the factory door was made voluntarily by the plaintiff and for its own convenience without any promise on the part of any duly authorized Government officer to be compensated therefor.

III. On November 22, 1919, the plaintiff submitted to the United States its proposal upon which the contract No. 1343–N of December 10, 1919, was awarded. The proposal was on Q. M. C. Form Nos. 119 and 119–B, captioned Circular—Proposal. The first part contained the advertisement of the United States for sealed proposals and included the following provision: "Bidders for supplies must state the time when and the place where they propose to make deliveries. Bids are invited for delivery as indicated below, but proposals for delivery at other points will be entertained." The bidder was required to state in Q. M. C. Form No. 119–B, which was a part of the proposal, the name and the location of mills from which the goods would be shipped, the terms upon which the goods would be sold, the manner of shipment, etc. The printed wording of the line upon which the manner of shipment was to be designated was as follows: "f. o. b. cars ——." In making its proposal the plaintiff drew a line through the word "cars" and wrote above the stricken word, the word "factory" and followed the word "factory" by the words "New York, N. Y." At the bottom of the form the plaintiff added the following provision: "If the Government desires us to make deliveries to Brooklyn, N. Y., New York City, or Hoboken, New Jersey Pier, there will be an additional charge of $1.00 per casket." The formal contract No. 1343–N of December 10, 1919, adopted the phraseology of the bidder and provided that delivery should be "*f. o. b. factory, New York City, N. Y.*" These contracts are in the record and made a part of this finding by reference thereto.

IV. After the award of the first contract was made the plaintiff largely increased its personnel and arranged to devote practically all of its facilities to Government work. After a certain number of caskets had been completed by the plaintiff and had been inspected and accepted for the

defendant by one of the defendant's inspectors, the defendant was notified and soon thereafter began moving the caskets from the plaintiff's factory to its Brooklyn base by trucks for loading upon transports for foreign shipment. The caskets were of extra size and weight and were not easy to handle. Including its outside packing case each casket measured nearly 10 feet in length, 3 feet in width, and weighed approximately 500 pounds.

A crew of four or five men was required for the handling of a casket. The trucks used by the defendant were of six-casket capacity and were able to make but two trips a day from the plaintiff's factory to the Brooklyn base. The plaintiff's warehouse had a storage capacity for about 350 completed caskets, and inasmuch as the plaintiff was completing caskets at the rate of about 1,500 per month, while the defendant was taking delivery of but about 12 caskets per day, the plaintiff's plant was rapidly becoming so overcrowded with finished caskets that its operating facilities were becoming impaired.

V. After the plaintiff had been complaining for some time to the defendant's inspectors and to Major Harrie D. W. Riley (who was then production and inspection officer at the New York general intermediate depot, and who was the Government officer responsible for the deliveries under the contract) of the congested situation which was resulting from the inadequate means being used by the defendant in taking deliveries from the plaintiff's factory the plan of trucking the caskets to the Brooklyn base was by mutual agreement abandoned. The defendant agreed to place barges or lighters at the foot of 106th Street, New York City, which was a distance of a few hundred feet from the plaintiff's factory, and the plaintiff was to move the caskets from its factory to the dock and to load them upon the barges. Each barge would accommodate approximately 300 caskets, and when loaded the barges were moved by tugs to New York Harbor, where the caskets were placed on board the waiting transports.

VI. 352 of the 6,000 caskets sold by the plaintiff to the defendant under contract No. 1343–N were taken by Gov-

ernment trucks, as per terms of the contracts, at the door of the plaintiff's factory by the defendant. The remaining 5,648 caskets were moved from the plaintiff's factory to the dock and loaded on the barges by the plaintiff between March 10, 1920, and July 27, 1920. The plaintiff is suing in D–800 to recover the actual expenditures made by it in the delivery of the said 5,648 caskets from the factory to the dock and for the loading of the caskets onto the barges and the lighters. In performing its contracts the plaintiff employed a force of laborers, boat hands, and a supervisor to supervise their work. The plaintiff also hired certain trucks and purchased one for $1,000, which was later sold for $50.00. The trucks and the laborers were when needed employed in making deliveries of caskets to the wharf and loading the same on barges; when not so engaged they were employed in and about plaintiff's factory. When engaged in loading the barges the boat hands were responsible for properly doing the work.

VII. The plaintiff expended from about March 10, 1920, to July 27, 1920, $3,956.53 for boat hands, $3,187.89 for laborers, $499.38 for a supervisor, $7,873.50 for truck hire, and $492.83 for a chauffeur. Just what proportion of this expense is chargeable to the moving and loading on the barges of the caskets moved and loaded is not known. The total sum charged was not all expended in the performance of this particular service. Some of the laborers performing this service were used in the plaintiff's factory for moving the finished caskets down to the shipping room for convenient loading on the trucks, and some others were employed in other work.

VIII. The parties in interest in D–800 and D–801 are identical. By stipulation of counsel the testimony of several of the witnesses was taken at one time to apply to the two cases. In D–800 the J. & J. W. Stolts Association brought suit against the United States to recover its costs of delivery of 5,648 caskets sold by the plaintiff to the United States under a contract, No. 1343–N, which provided for deliveries to be made "*f. o. b. factory, New York City.*" The plaintiff in that action has included its costs for moving the caskets

from its factory to a dock designated by the defendant and for then loading the caskets from the dock onto barges and lighters.

The plaintiff is seeking in D–801 to recover its costs of the loading of 10,000 additional caskets from the dock to barges and lighters upon which the caskets were carried to transports in New York Harbor for foreign shipment. Those caskets were the ones purchased by the United States under contract No. 1389–N, which provided for "*deliveries f. o. b. New York.*"

10,000 caskets purchased by the United States under contract No. 1389–N were actually loaded by the plaintiff from the dock designated by the United States onto the barges. It appears that the plaintiff expended for this and other purposes in connection with the performance of its contracts $3,627.06 in handling the caskets and performing the contracts. It also appears that barges were not always available at the dock and that the plaintiff was during the periods of delay required to keep its force of boat hands waiting and ready to make deliveries when the barges arrived. The Government furnished only a captain on each barge, and all labor employed in the loading of the barges was supplied by the plaintiff.

The court decided that plaintiff was not entitled to recover.

Booth, *Judge*, delivered the opinion of the court:

The plaintiff, a New York corporation, states a cause of action resting upon an alleged right to recover on the basis of *quantum meruit* for extra work performed and labor furnished over and above that required by the stipulations of two certain contracts with the Government. On December 10, 1919, written contract #1343N was executed by the parties. The plaintiff under the terms of the agreement was to manufacture and deliver f. o. b. factory, New York City, N. Y., 6,000 caskets at a unit price of $62.50 each. On April 16, 1920, written contract #1389N was executed by the parties. This contract is similar to the above, covers the

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same subject matter, and differs only with respect to number and price of caskets to be furnished and stated point of delivery. Instead of employing the words "f. o. b. factory," as in contract #1343N, the words "deliveries f. o. b. New York" appear.

The plaintiff filed two petitions, one involving contract #1343N and the other contract #1389N. The facts upon which the right of recovery is based are the same in each case, the parties stipulating that the findings in one, except as to amount involved, may be taken as the findings in both.

During the course of contract performance the defendant at first provided trucks for the transportation of the caskets from the door of plaintiff's factory to a point where they were to be transported by the defendant overseas; 352 of the 6,000 caskets under contract #1343N were handled by the defendant in this manner. It soon developed that the method employed was embarrassing to both the plaintiff and defendant. The plantiff under the method, necessarily slow, was confronted with an overstocking of its storage capacity and the defendant with an increasing delay in supplying the wants of an urgent necessity. To relieve the situation the defendant agreed to place barges or lighters at the foot of 106th Street, New York City, a distance of some 200 feet from plaintiff's factory, and the plaintiff was instructed and consented to move the caskets from its factory and load them upon the barges. The plaintiff performed this service. In doing so the allegation is made that under contract #1343N it incurred an additional expense, found by the commissioner to be $16,010.13, and a like expense under contract #1389N of $3,627.06. It is for the recovery of the total of these sums that the suits are brought.

Obviously, it is essential for the plaintiff to establish that the services and expense incurred, for which judgment is sought, were rendered and incurred under such circumstances as to warrant the court in implying an agreement to pay their reasonable worth by the defendant. The contractual liability of the Government under a proper state of facts is manifestly to be conceded; but one dealing with the Gov-

ernment is required to observe strictly the extent of authority possessed by the agent of the Government to act in the premises, and this essential factor is equally important whether the transaction is covered by a written contract or arises without one. *Grant's case*, 5 C. Cls. 71; *Baltimore & Ohio R. R.* v. *United States*, 261 U. S. 592; *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States*, 254 U. S. 141. Where contracts to pay have been implied in dealings with the Government the question of authority to act has been established. In this case the record discloses not only an utter lack of authority upon the part of the agent of the Government to act, but a positive assertion from that source that the arrangement finally consummated for delivery of the caskets was one mutually assented to and of mutual advantage to the parties to the contracts. The facts of the case aside from oral testimony are distinctly corroborative of a mutual understanding that the plaintiff was anxious to effect the changed arrangements for delivery of the caskets. The contracts provided for prompt delivery of the caskets in quantities. Considerable congestion seemed inevitable, and the plaintiff escaped the additional expense and inconvenience of storage expenses by acceding to a change in the contract in this respect, i. e., by prompt deliveries to a point almost adjacent to its factory door.

The plaintiff accepted without protest or objection the contract price for the caskets. It even did more, it entered into two contracts both bearing dates subsequent to the change made as to point of delivery without making claim for additional expense which, at the moment, it was incurring in making deliveries under its first contract. It was not until some years after the entire transaction had been closed that these suits were brought.

Paragraph 17 of the contracts provided in express terms a method for the adjustment and settlement of "any claims, doubts, or disputes which may arise under this contract, or as to its performance or nonperformance, and which are not disposed of by mutual agreement." The plaintiff was provided with a method of procedure in the contracts themselves whereby it could have protected itself against the additional expense now claimed. This method was not

invoked; on the contrary, the record discloses that the plaintiff inaugurated the change made as to deliveries, invited the officers of the Government to relieve a congested situation, and voluntarily assented to accept the same, without making a claim for additional compensation until long after final settlement of the entire transaction.

We think the petitions in cases D-800 and D-801 should both be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

SIMON D. HARRIS, MARK HARRIS, AND LOUIS H. HARRIS, COPARTNERS, TRADING AS HARRIS RUBBER COMPANY, v. THE UNITED STATES

[No. D-533]

On the Proofs

Contract for raincoats; indictment of contractor; suspension of work; substitution of order for contract; new terms; authority of Secretary of War.—(1) Where work under a contract for the manufacture of raincoats was suspended in good faith by the Secretary of War because of the indictment of a member of the contracting firm for alleged bribery and the making of defective war material in fulfilling the contract, and an order for raincoats, with terms different from those of the contract, was substituted by the Government for the contract, and if settlement of the order, upon its termination, the contractor gave a full release to the United States in connection with the order, and made no objection to the course pursued, the settlement so made is to be taken as a settlement not only of the order but of the contract, and the contractor is bound accordingly.

(2) Under the circumstances recited the Secretary of War had authority to suspend the work. His authority to cancel the contract not decided.

The Reporter's statement of the case:

Mr. Lawrence A. Baker for the plaintiff.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Decided April 2, 1928. Motion for new trial overruled October 22, 1928.

The court made special findings of fact, as follows:

I. The plaintiffs, Simon D. Harris, Mark Harris, and Louis H. Harris, are all citizens of the United States, and residents of the city and State of New York, and at the time of and before the happening of the events hereinafter set forth were copartners trading as Harris Raincoat Company and Harris Rubber Company. Both names were used to describe the same copartnership, the use of one or the other depending on the material to be furnished to customers who might be interested in the purchase of raincoats and related products manufactured by the said copartnership.

II. On the 19th day of April, 1918, the plaintiffs and the United States made and entered into a contract, No. 2119–N, a copy of which is attached to plaintiff's petition as Exhibit A, and made a part hereof by reference thereto, wherein the United States agreed to purchase and the plaintiffs agreed to deliver the following material at the following prices:

180,000 raincoats, foot, to be made from standard patterns furnished by the Government, and in accordance with Specification 1317, attached to the contract, except lightweight coats to be made with face and lining of lightweight materials (5.35 yards per pound), lightweight coats to be furnished at $5.07 each, and heavyweight coats to be furnished at $5.58.

III. Said contract required a supply of two different grades of coats at varying costs for material. For manufacture of the coats to be supplied at a price of $5.07 each, plaintiffs purchased bombazine at a cost of $0.1616 a yard; and for the manufacture of the coats to be supplied at $5.58 each, top material was bought at a cost of $0.2588 a yard. The linings of both coats were the same. For rubberizing plaintiffs paid $0.20 a yard. Rubberizing was the same on both grades of material. Strapping of bombazine was used at a cost of $0.10 for each coat, and hardware consisting of buckles, eyelets, snappers, and buttons was used, at a cost of approximately $0.15 for each coat. Further

manufacture required so-called operating and cementing at a cost of about $0.68 for operating and $0.45 for cementing, which prices were agreed upon between the plaintiffs and the workmen pursuant to instructions of a Government board. In addition to the foregoing there was required for each coat cotton costing approximately $0.03 and cutting of the garment at a cost of $0.10. The foregoing practically covered the cost of the coat. Of the foregoing costs material, rubberizing and rubber, and certain labor costs were fixed by a board selected by the United States, and in performance of the contract plaintiffs obtained from the Government from time to time requisitions for the amount of materials desired.

The foregoing conditions of cost, and particularly the fixed cost of wages, were taken into account and the price to be paid for each raincoat was fixed by the United States, in connection with the award of the contract on an apportionment basis, to these plaintiffs and certain other manufacturers, all of whom proposed to supply the two grades of coat at the same prices, namely, $5.07 for the lightweight coat and $5.58 for the heavyweight coat. With allowance for costs, as indicated, and overhead, the actual complete cost of the lightweight coat was $4.578, yielding a profit of approximately $0.50 on each lightweight coat delivered. Pursuing the same method of approximation, there was a prospective profit of $0.50 on each of the heavyweight coats. Requisitions for delivery of coats required by the contract were furnished in accordance with available material and were manufactured of light or heavy weight, as material was supplied.

Government inspectors were assigned to the factories of the plaintiffs, and all coats delivered under the contract were inspected before leaving the factories.

IV. On July 21, 1918, one of the plaintiffs, Simon D. Harris, was arrested by representatives of the Department of Justice, told that he was under arrest on the charge of bribing an officer of the Government, and on July 22, 1918, after a hearing, released on bail.

On July 22, 1918, an official of the Government, a captain located in Whitehall Street, who had charge of the contract,

who approved plaintiffs' requisitions for money, and to whom plaintiffs looked forward in every direction on the contract, told them to suspend work. Plaintiffs, without protest or complaint, immediately ceased their manufacture, and payments by the Government were suspended. Of the two classes of coats manufactured under contract No. 2119–N, deliveries were made and accepted of 26,360 coats of heavy material and 50,280 coats of light material, some of which deliveries were made after the suspension of the work, but the amount thereof does not appear. Not only plaintiffs but other raincoat manufacturers who were manufacturing coats for the Government at the same time and under similar contracts were told to cease manufacture.

On or before August 9, 1918, two indictments were returned against the said Harris by the Federal grand jury for the Southern District of New York, severally charging him with bribing a Government inspector, section 39, U. S. C. C., and with obstructing the United States in prosecuting the war by making defective war material, section 3, act of April 20, 1918. Some time later, at what date does not appear, these indictments were dismissed.

On or about August 10, 1918, plaintiffs were notified by letter from the depot quartermaster, New York City, in part as follows:

"Effective Monday, August 12, 1918, all Government inspections of raincoats at the plant of the contractor will be discontinued. Government inspectors will be stationed at plant of each contractor to cooperate in the manufacturing process, but will not accept goods as heretofore. All inspections on and after this date will be made at Atlantic Terminal, #9 Imlay Street, Brooklyn. All completed raincoats which you now have on hand, whether inspected or not, will be inspected in due course at Atlantic Terminal."

Attached to this letter was a copy of a communication dated August 9, 1918, setting out a letter from the Acting Quartermaster General, compliance with which the said depot quartermaster stated would be required, in words as follows:

"1. There are certain raincoat contractors in the New York district that have been either arrested or indicted, or

have had an important employee, or employees, such as superintendents, or foremen, arrested or indicted.

"2. You are ordered to notify the depot quartermaster, New York depot, to instruct such contractors that if they cut any more garments against their contract until further notice that they do so at their own risk; and you are to issue instructions against the accepting until further notice of any garments cut after a copy of these instructions has been given to the contractor.

"3. You are ordered to instruct the depot quartermaster that he may inspect such garments as are now completed, or that are in the process of manufacture, and that he may accept such of these garments as meet the requirements of the specifications as to material and workmanship."

In suspending the aforesaid contract of April 19, 1918, No. 2119–N, the War Department acted in entire good faith and in the reasonable belief that there had been a failure by the plaintiffs to perform, and that they had breached the said contract by criminal acts to the detriment of public interests and the prosecution of the war.

V. On August 27, 1918, the War Department issued an order to the plaintiffs for the manufacture of 38,194 heavyweight raincoats at $5.52 each, and 38,675 lightweight raincoats at $4.99 each, a total of 76,869 coats, this order being designated as "U. S. Army Order No. 687 B/C–4536–N." The specifications for the manufacture of the coats to be delivered under this order were the same as those in contract No. 2119–N, but under order No. 687 B/C–4536–N the plaintiffs were required to deliver the heavyweight coats at a price of 6 cents per garment less than the price stipulated in the original contract and the lightweight coats at a price of 8 cents per garment less than the price provided by the original contract.

Plaintiffs accepted order No. 687 B/C–4536–N without protest, resumed work, and manufactured and delivered thereunder 68,900 coats. All of the said 68,900 coats were accepted and paid for in full by the Government at the rates specified in the order without protest by plaintiffs; 7,969 raincoats of the 76,869 garments specified therein were not manufactured and delivered because of the termination of the order by the Government prior to its completion.

Compensation was paid by the United States to the plaintiffs for any and all loss suffered by the plaintiffs on account of the cancellation and termination of order No. 687 B/C-4536-N prior to its completion, and the United States obtained a full release from the plaintiffs in connection therewith.

The materials which were left on hand and available at the time work was suspended under the original contract, on July 22, 1918, were all thereafter utilized in the manufacture of the coats under the subsequent order, so that the plaintiffs incurred no loss on materials by reason of suspension of work under the original contract.

VI. After the order of August 27, 1918, No. 687 B/C-4536-N, had been terminated the plaintiffs, on June 28, 1919, presented a claim before the War Department, under the act of March 2, 1919 (Dent Act), to recover $41,059.81 as their alleged loss, resulting both from suspension of work under the original contract, No. 2119-N, and from termination of order No. 687 B/C-4536-N. The claim as filed included items of loss on factory (cost less salvage), $4,307.56; cost of machinery, less 10 per cent depreciation, $243.00; overhead expense during five weeks of suspension of work, July and August, 1918, $6,250.00; loss on materials purchased for contract No. 2119-N, $16,563.10; the difference in price paid for raincoats under the original contract and the subsequent order (for 68,339 coats delivered under the subsequent order), $4,940.90; and adjustment for undelivered portion of 180,000 coats originally ordered (35,021) at 25 cents per garment, $8,755.25, treating the coats delivered under the subsequent order as in part satisfaction of the original contract; making a total of $41,059.81.

VII. Thereafter, on October 20, 1919, the War Department Board of Appraisers made an award of $12,844.83 to plaintiffs under order No. 687 B/C-4536-N, which was on October 30, 1919, accepted by plaintiffs as satisfactory, and a release executed by them discharging the United States of all claims under said order. The basis of the settlement consisted in the payment for loss on all materials on hand, and a flat payment of "25 cent per garment unde-

livered, for compensation for overhead expenses, training of operators, special facilities, and any other items of expense incurred in the preparation for and execution of the contract."

VIII. Between July 22, 1918, and August 27, 1918, which was the period of suspension of work, the Wooster Street shop of plaintiffs, which shop was used exclusively by plaintiffs for making Government raincoats, both under the original contract and the subsequent order, was shut down and the personnel thereof was discharged with the exception of those persons whom plaintiffs were required to retain in order to maintain a basis for a permanent organization. During that period the overhead expense at that shop was as follows:

Rent at $275.00 per month, for one month and five days, amounting to $323.83.

The pay roll at this shop for this period of five weeks, as shown on plaintiffs' ledger sheets, was as follows:

July 27, $787.39; August 3, $227.55; August 10, $105.00; August 17, $127.20; August 24, $285.86; August 31, $490.75; but as only one-half week is to be counted to August 27, this amounts to $245.38; making a total of $1,779.13 for the pay roll, to which is to be added an allocation of one-third of $70.00 per week, which was the total of miscellaneous overhead, light, stationery, and incidentals at three shops, one-third being allocated to the Wooster Street shop, which for five weeks amounts to $116.67. To this is added $320.83 for rent, making a total overhead of $2,216.63.

The court decided that plaintiffs were not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiffs entered into a contract with the defendant, through the Secretary of War, on April 19, 1918, for the manufacture of "approximately" 180,000 raincoats. While plaintiffs were engaged in carrying out said contract, the War Department, on July 22, ordered the suspension of the work owing to the arrest on July 21 of a member of plaintiffs' firm, who was charged with attempting to bribe a

Government inspector and with defrauding the Government by manufacturing inferior raincoats. This action by the department was taken because of the arrest of the said plaintiff, his incarceration during the night of July 21, and his being held under bail for the grand jury on July 22. The Government acted in good faith, in the light of the charges against said plaintiff, and in the reasonable belief that there had been a failure by plaintiffs to perform and that they had violated their contract by criminal acts, to the detriment of the public interest and the prosecution of the war.

The plaintiffs made no protest, nor did they offer to continue with the work then or at any time thereafter, or demand to be allowed to do so. The suspension, which lasted for five weeks, merely stopped the cutting of new material, and all of the coats completed by plaintiffs were delivered and paid for. The course of the Government seems to have been acquiesced in by plaintiffs. The Government, on August 12, adopted a new system of inspection, notice of which was given to plaintiffs, and on August 27 an order was issued to them which amounted to a resumption of work but under somewhat changed conditions; that is, the number of raincoats to be supplied under the original contract was reduced and the prices, respectively, for heavyweight and lightweight raincoats were slightly reduced. The specifications, however, were the same as under the contract. The plaintiffs accepted the order without protest and proceeded to fill it by using the materials which were available under the contract. They supplied all but 7,969 coats called for by the order and were paid, and accepted without protest, the price fixed in the order.

After the armistice the War Department terminated the work, and thereafter its board of appraisers settled with the plaintiffs for all claims growing out of the failure to complete the work, including an allowance of 25 cents a garment for those undelivered. The plaintiffs received the payment under this settlement and signed a release in full of all claims under the order. As this order was a modification, mutually agreed to, of the original contract, the settlement is to be treated as a settlement under the contract and order.

Syllabus

Plaintiffs asserted no further claim against the Government at any time until this suit was brought, one day before the expiration of the statute of limitations.

We hold that a fair construction of the facts leads to the conclusion that the plaintiffs are bound by the settlement with the War Department board of appraisers. Aside from this, however, we hold that the Secretary of War had authority to suspend the work under the circumstances of the case. See *United States* v. *Adams*, 7 Wall. 463, 477. Whether he had authority to cancel the contract under the decision just named, in view of the conclusion reached, it is not necessary to decide. The petition should be dismissed, and it is so ordered.

MOSS, *Judge;* BOOTH, *Judge;* and CAMPBELL, *Chief Justice*, concur.

JULIUS J. GOETZ, TRUSTEE IN BANKRUPTCY OF THE MILWAUKEE PATENT LEATHER CO., v. THE UNITED STATES

[No. D-682]

On the Proofs

Dent Act; subcontractor; authority of Army officers; request to manufacture Army leather; promise to purchase output.—Where upon the representation of traveling supervisors in the office of the Quartermaster General of the Army, not contracting officers, that they wanted plaintiff's company, whose business was the tanning of patent leather, to manufacture heavy leather for Army purposes, and that the Government would pay for necessary changes in machinery and equipment, the company makes such changes and manufactures and sells to Government contractors leather so manufactured by it, but does not itself have a formal contract with the Government and incurs a loss due to the intervention of the armistice, there can be no recovery under the Dent Act, nor does a statement made by an Army officer that all of the Army leather manufactured by the company that was satisfactory would be taken and used by the manufacturers of Army shoes constitute a taking or requisition of such leather.

The Reporter's statement of the case:

Mr. Raymond M. Hudson for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Decided April 16, 1928. Motion for new trial overruled October 8, 1928.

The court made special findings of fact, as follows:

I. The Milwaukee Patent Leather Company is now, and was at the times hereinafter mentioned, a corporation duly organized and existing under the laws of the State of Wisconsin, and engaged in the tanning of patent leather.

II. At the time of the filing of this action Julius J. Goetz was the duly appointed, qualified, and acting trustee in bankruptcy of the Milwaukee Patent Leather Company, plaintiff herein.

III. In the early spring of 1918 the Milwaukee Patent Leather Company began experimenting with the tanning of leather for Army shoes, and prior to April 20, 1918, had delivered some leather to an Army shoe manufacturer. On or about the 20th day of April, 1918, W. B. Eisendrath and F. Sheldon, traveling supervisors of the inspection leather subdivision in the office of the Quartermaster General of the Army, called at plaintiff's factory and advised the officials of the company that the Government needed the cooperation of all tanners to increase the production of Army leather, and that unless tanners cooperated with the Government their supplies of hide and coal would be limited, if not completely shut off.

At this time patent leather had been declared a nonessential, within the meaning of the term as used during the World War.

The said Eisendrath and Sheldon also told the officials of the plaintiff company that they wanted plaintiff to manufacture heavy leather for Army purposes and that if plaintiff company did not have the machinery and facilities for manufacturing such heavy leather the Government would pay for such changes in machinery and equipment as were necessary.

IV. The officers of plaintiff company were willing to cooperate, and following the instructions of the said Eisendrath and Sheldon they made certain changes in the plant, machinery and equipment, changing the same from a patent-leather plant to a plant for the manufacture of United States Government Army leather. The cost of making such changes of the plant and equipment was $18,586.80, which the plaintiff company paid. Plaintiff has not been reimbursed this amount or any part of same by the Government. No formal contract of any kind was entered into by and between plaintiff company and the Government of the United States.

V. Prior to the entrance of the United States into the World War there had been organized an association of tanners known as the Tanners' Council, which during the year 1918 acted as an intermediary between the tanners and the Government. Through the officers of this council the Government exercised control of the trading in hides and leather, and contracts for shoes were given manufacturers in accordance with the quantity of leather being manufactured as reported to the Tanners' Council.

During the year 1918 Fred A. Vogel was president of the Tanners' Council, and at the same time he was chief of the upper-leather section of the hide and leather contract branch of the office of the Quartermaster General of the Army.

VI. Immediately following the visit of Eisendrath and Sheldon to plaintiff's plant, Fred A. Vogel wrote to plaintiff advising that the Government had placed plaintiff company's name on the list of tanners that would have preference in securing the Chicago packers' hides, and also furnished plaintiff company with a list of the manufacturers of Army shoes. Plaintiff company was further advised by Vogel, Eisendrath, and Sheldon that all of the Army leather that they manufactured that was satisfactory would be taken and used by the manufacturers of Army shoes.

VII. During the year 1918 plaintiff company delivered all of the leather that it manufactured to Government shoe manufacturers. All of this leather was inspected by the Government inspectors at plaintiff's plant, and the number

of the shoe manufacturer's contract was stamped upon leather that was delivered to the shoe manufacturers.

At the time of the cessation of hostilities, following the signing of the armistice, plaintiff had on hand 373,647½ square feet of leather which had been approved by the Government agents as suitable for Army use, the value of which, as fixed by the Tanners' Council and approved by the Government, was at said time $39,786.73. 275,687¼ square feet of this leather was covered by contracts between the company and certain manufacturers of Army shoes. It does not appear from the evidence what disposition was made of this 275,687¼ square feet; neither does it appear from the evidence what disposition plaintiff company made of the remaining 97,960¼ square feet. It does not appear from the evidence what this leather was worth if sold as commercial leather on the market.

VIII. Plaintiff company filed a claim with the Secretary of War prior to June 30, 1919, which claim was disallowed in full by the Secretary of War.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover a judgment for $76,531.68. The Milwaukee Patent Leather Company, a Wisconsin corporation now in bankruptcy, was, as its name indicates, engaged in producing patent leather. When the country became involved in war the company, recognizing the need for a quality of leather different from patent leather, began to experiment with the tanning of a quality and kind of leather suitable for Army use. Patent leather was a nonessential, and under Government regulations allotments of hides and coal for its production were not favored. Fred A. Vogel was president of the Tanners' Council and chief of the upper-leather section of the hide and leather contract branch of the office of the Quartermaster General of the Army during the time covered by this controversy. On April 20, 1918, two traveling supervisors of the inspection

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leather subdivision in the office of the Quartermaster General, visited the plant of the plaintiff corporation and advised the owners of the necessity for cooperation in producing and supplying to contractors their full portion of Army leather, asserting at the time that if the necessary proportion of leather could not be produced by the corporation because of insufficient equipment the Government would pay for such changes as it was necessary to make. The plaintiff, acting under this assurance, did make changes in its plant equipment, which undeniably cost the company $18,586.80. After the changes were made the company produced a large amount of Army leather and sold it to contractors engaged in making Army shoes for the Government. Vogel advised the company as to the list of Army contractors and wrote the company that all Army leather tanned by it that was satisfactory to the Government would be taken. The corporation presented a claim under the Dent Act to the Board of Contract Adjustment, War Department. The board disallowed it, and the Secretary of War, on appeal, affirmed the disallowance.

The defendant challenges the authority of the two inspectors to enter into a contract to pay for the changes made in the company's contract. There can be no doubt that an oral agreement was made at the time charged, but proof of this fact alone is not sufficient to sustain the validity of such a contract under the Dent Act. *Baltmore & Oho Railroad* v. *United States*, 261 U. S. 592. Authority to act is an essential element of a Dent Act case, and no such authority is proven. On the other branch of the case, i. e., the contention for a right of recovery for the value of the leather left on the company's hands when the contracts which the Government had with shoe manufacturers were canceled by the Government, two impediments stand in the way of recovery. First. It is not shown what disposition was made of this leather or what, if any, salvage value it may have had. Second. The contract which Vogel is alleged to have made for its taking over by the Government was not in fact a Government requisition. Vogel did advise the company that Government contractors would take and use all the

Army leather meeting the necessary requirements. This was no more than an assurance that the needs of the Government would require plaintiff's production and does not amount to a requisition of the leather. The company continued to produce Army leather, and its entire production except the surplus here involved was taken by independent contractors and paid for by them until their own contracts were canceled. The production of leather was under the control of the Government. The tanners were encouraged to increase supply, and the Government kept them advised as to the identity of contractors who would take their supply, and afforded opportunities for the making of contracts with these contractors. The "Tanners' Council," through Vogel and assistants, a governmental medium for control of the trading in hides and leather were alone concerned in keeping in touch with the extent of leather production in the country and doing their utmost to keep the supply up to shoe manufacuring contractors' needs. In this case it is apparent that if the demand had continued every assurance of the council would have materialized; as it happened, the termination of the war closed the demand and left the plaintiff with its supply above the demand. Therefore, the situation, like many of a similar nature, found the plaintiff with a supply of leather which its contractors did not take. The abnormal demand for war supplies was of course one of public notoriety, and manufacturers of supplies were charged with notice that its sudden discontinuance might momentarily occur. Having made contracts with manufacturers to supply their needs, this element of risk was essentially part of the undertaking, and the Government is not to be held liable under the theory of a taking because of the termination of the war, wherein the dealings were directly between an independent contractor and the manufacturer. There is no evidence in the record to warrant a holding that Vogel was taking leather for the Government or that he had authority so to do. The case is similar to the case of *Lawrence Leather Co.* v. *United States*, 61 C. Cls. 304.

The petition will be dismissed. It is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and CAMPBELL, *Chief Justice*, concur.

GREEN, *Judge*, took no part in the decision of this case.

BENJAMIN WALL v. THE UNITED STATES

[No. E-553]

On the Proofs

Army pay; Graves Registration Service; written contract for services; bonus.—His contract of hire with the Quartermaster Corps, United States Army, in connection with the Graves Registration Service, being for services abroad and for a specified compensation per annum, the plaintiff was not entitled to the bonus provided by section 7, act of March 1, 1919, 40 Stat. 1213, 1267.

The Reporter's statement of the case:

Mr. Henry W. Driscoll for the plaintiff.

Mr. James J. Lenihan, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Frank J. Keating* was on the brief.

Decided April 16, 1928. Plaintiff granted 40 days from June 18, 1928, in which to file motion for new trial. Motion for new trial not filed.

The court made special findings of fact, as follows:

I. The plaintiff, Benjamin Wall, was employed for temporary service in connection with the removal of the dead in Europe, by the Graves Registration Service, Quartermaster Corps, United States Army, on December 10, 1919; he entered into a contract in writing on that date to serve as master of section for a compensation of $2,400 per annum with an increase in pay of 10 per cent for foreign service.

A copy of agreement for temporary service is attached to the petition herein and made a part of this finding by reference.

II. Upon arrival at Southampton, England, on December 20, 1919, plaintiff was assigned to duties at Swaythling, a British Army remount station, which is approximately two miles distant from Southampton. Plaintiff performed his duties at Swaythling for the period from December 20, 1919, to March 16, 1920. Plaintiff performed no duties of any kind at Southampton.

III. Before entering the service of the Graves Registration Service for removal of the dead in Europe, plaintiff was employed in the Quartermaster Corps of the War Department, where he was certified for allowance of increased compensation, or bonus, provided for civilian employees of the United States. Plaintiff received increased compensation, or bonus, from the date he was certified as eligible, December 1, 1919, until he resigned his position as auditor accountant in the War Department, to accept contract with the Graves Registration Service on December 10, 1919.

IV. While in the service of the Graves Registration Service for removal of the dead in Europe, plaintiff received compensation at the rate of $2,400 per year, with 10 per cent increase for foreign service pay. He has not received a per diem of $4.00 for the period of his service at Swaythling, and he has not received the bonus of $20 per month.

V. If entitled to a per diem of $4.00 for the period of his service at Swaythling plaintiff is entitled to receive $352.00.

If entitled to a bonus of $20 per month for the period of his service in the Graves Registration Service from December 10, 1919, to April 8, 1920, both dates inclusive, he is entitled to the additional amount of $80.00. If entitled as above, plaintiff should receive, in addition to what he has already received, the sum of $432.

The court decided that plaintiff was not entitled to recover.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The petition avers and the proof shows that the plaintiff was engaged under a written contract. He agreed to serve

with the Graves Registration Service, Quartermaster Corps, in connection with the removal of the dead in Europe. His compensation was fixed by the agreement, which also provided that allowances prescribed by Army regulations or general orders for civilian employees were authorized under the agreement. He relies on Army Regulation 733, which directs that civilian employees may be allowed, "when their orders so prescribe," flat per diem allowances "when traveling and when on duty for the first 30 days at places designated in their orders for the performance of temporary duty" and have reimbursement of actual expenses when traveling under competent orders.

The plaintiff, residing in Washington, D. C., was ordered to proceed to New York and take passage on a Government transport sailing for Southampton. Two days' time was consumed from date of leaving Washington until date of sailing and he was paid the per diem allowance for those two days. He was furnished transportation and subsistence to Southampton. His contention is that he is entitled to a per diem allowance of $4 for a stated period because he says, "Southampton was the station named in plaintiff's orders," but there is no order produced to establish this. He was under contract. The port to which he went was Southampton. He performed his service at Swaythling, a distance, it is claimed, of about two miles from Southampton, and, so far as the record discloses, the plaintiff was assigned to duty at Swaythling. He performed none elsewhere. If he traveled from the one place to another, it does not appear that he did so "under competent orders." The plaintiff has no claim to the "bonus" allowed certain Government employees, the act not extending its provisions to contract employees rendering service in foreign countries. The Comptroller General disallowed the claim asserted, and we think he was right. The petition should be dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.
GREEN, *Judge*, took no part in the decision of this case.

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THE OKANOGAN, METHOW, SAN POEILS (OR SAN POIL), NESPELEM, COLVILLE, AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON v. THE UNITED STATES[1]

[No. H-121]

On Demurrer to Petition

Statutory enactments; adjournment of Congress before return of bill; Article I, section 7, clause 2, of the Constitution.—Senate bill No. 3185, 69th Congress, 1st session, entitled "An act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," duly passed by both Houses of Congress and presented to the President but not returned by him or at any time approved, was prevented, under Article I, section 7, clause 2, of the Constitution, from becoming a law by the adjournment of Congress before the expiration of 10 days (Sundays excepted) after the bill was presented. Nor does the fact that the adjournment was only of the first session of Congress, affect the status of the bill.

The Reporter's statement of the case:

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer. *Mr. W. F. Norris* was on the brief.

Mr. William E. Lewis, opposed.

Decided April 16, 1928. Motion for new trial overruled October 22, 1928.

The material averments of the petition are stated in the opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

A petition was filed March 28, 1927, by the Okanogan and other tribes or bands of Indians alleging that the suit is brought under authority of an act of Congress described as Senate bill No. 3185, 69th Congress, 1st session, entitled "An act authorizing certain Indian tribes and bands, or any of

[1] Certiorari granted.

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them, residing in the State of Washington, to present their claims to the Court of Claims." A copy of this alleged act appears in the petition. It is further alleged that this bill having been duly passed by both Houses of Congress, on June 23, 1926, was signed by the presiding officers thereof and "duly attested as by law required" and thereafter, on June 24, 1926, was duly presented to the President of the United States, and that "the said bill not being returned by the President within 10 days after it was so presented to him, or at all, the same became and now is a law in like manner as if he had signed it." The demurrer presents the one question whether in the circumstances stated the bill ever became a law.

Article I, section 7, clause 2, of the Constitution of the United States is as follows:

"Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States. If he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. * * * If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment prevent its return, in which case it shall not be a law."

The bill was presented to the President on June 24, 1926. On July 3, 1926 (eight days thereafter, Sunday excepted), there was a final adjournment of the first session of the 69th Congress. The President did not approve or sign the bill. He did not make any return of it to either House. He did not deposit it with the Secretary of State as a law. When the 69th Congress reconvened in its second session on December 6, 1926, no return of the bill or of objections thereto had been or was made. These facts, it is urged for the plaintiffs, caused the bill to become a law. The Government contends to the contrary. The exact question it is conceded has not been decided by the Federal courts, but with great industry counsel for the parties have produced historical prece-

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dents and decisions by State courts supposed to bear upon or decide similar questions. Under the provision quoted a bill which shall have passed the two Houses of Congress shall, before it become a law, be presented to the President. "The only duty required of the President, by the Constitution in regard to a bill which he approves, is that he shall sign it. Nothing more. * * * Even in the event of his approving the bill, it is not required that he shall write on the bill the word approved, nor that he shall date it." *Gardner* v. *Collector*, 6 Wall. 499, 506. If the bill shall not be returned by him within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it. "Here are two courses of action by the President in reference to a bill presented to him, each of which results in the bill becoming a law. One of them is by signing the bill within ten days and the other is by keeping it ten days and refusing to sign it. * * * Yet, in the latter case, no evidence is required of the President, either by the Constitution or in actual practice, to show that he had ever received or considered the bill." *Gardner* v. *Collector*, *supra*. But if the President does not approve the bill, he shall return it with his objections, and he has ten days (Sundays excepted) within which this duty may be discharged. It seems to us that these provisions are not intended to make the President a part of the law making power, because Article I, section 1, of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States" which shall consist of a Senate and House of Representatives. See *Burton* v. *United States*, 202 U. S. 344, 367. They do not confer the power of peremptory veto though the term veto is now generally applied to a return of a bill by the President "with his objection." Story gives reasons why the President "should possess a qualified negative." Sec. 884, *et seq.* And Chancellor Kent says: "A qualified negative answers all the salutary purposes of an absolute one, for it is not to be presumed that two-thirds of both Houses of Congress on reconsideration * * * will ever concur in any unconstitutional measure." 1 Kent's Com. 255. In *Weil's case*,

29 C. Cls. 523, Judge Nott enters upon a lengthly discussion of the lawmaking power, which we refer to without committing ourselves to the conclusions reached in the particular case. Pointing out differences between the English and American systems, he says (p. 539): "Under the American Constitution the assent of the President is not essential to the enactment of a single law. His authority over an act of Congress is simply revisory and advisory. * * * If he does not approve, he does not forbid; he does not, in the sense of the Roman law, veto. On the contrary, he returns the bill to Congress with his reasons why it should not become a law—reasons which are not fiats, but which are addressed to the legislative intelligence." And he might have added as further showing that the President's assent is not necessary, that if the requisite two-thirds of each House approve the bill it becomes a law without being presented again to the President. The plaintiffs' contention would seem to imply that the provision "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him the same shall be a law in like manner as if he had signed it" is all that is said, but the contention disregards the following phrase, "unless the Congress by their adjournment prevent its return, in which case it shall not be a law." The ten days are provided for the President's deliberation and the proper formulation of his objections. They are not needed where he approves the bill or where by his inaction he is willing the bill shall become a law. In the latter case it is declared the bill shall be a law and in another category provided for it is just as emphatically declared that the bill shall not be a law, that being where "Congress by their adjournment prevent its return." The contention here is that the bill became a law because the adjournment of the Congress, which took place within the period of ten days (Sundays excepted) was only an adjournment of the 1st session of the 69th Congress, and the President did not return the bill to the Congress in its next session or in the meantime to officers or employees of the House or Senate who may have been in their places and have kept it until

the Congress was again in session. Unless we ignore the provision for a return of the bill within ten days (Sundays excepted), in case the President objects to it, it is manifest that he should have lodged it with these officers or employees within that period, if the contention have any merit. We look in vain for any requirement that the President return the bill after the ten days (Sundays excepted) shall have expired. It is also manifest that unless the concluding phrase, "in which case it shall not be a law," be ignored, there is no merit in the contention. Transmitting the bill to either employees or to the next session will not vitalize a bill that upon the adjournment the Constitution declares shall not be a law. The attempted distinction between adjournment of one or the other session is unsound. The fact in the instant case is that the first session of the 69th Congress adjourned several days before the expiration of the ten-day period provided for, and that was an adjournment of the Congress. The Constitution does not limit the time of adjournment to the final adjournment at the second session, and the courts have no right to so limit it. In *La Abra Silver Mining Company* v. *United States*, 175 U. S. 423, it was held that a bill signed by the President during a recess of the Congress and within the period of ten days (Sundays excepted) after it was presented to him became a law, but the court pretermitted the question whether he can sign a bill after the final adjournment of Congress for the session. In the course of the opinion it is said (p. 454): "But the Constitution places the approval and disapproval of bills, as to their becoming laws, upon a different basis. If the President does not approve a bill, he is required within a named time to send it back for consideration. But if by its action, after the presentation of a bill to the President, during the time given him by the Constitution for an examination of its provisions and for approving it by his signature, Congress puts it out of his power to return it, not approved, within that time to the House in which it originated, then the bill fails and does not become a law."

What we have said accords with the early view taken of the effect of an adjournment. In November, 1812, Presi-

dent Madison sent a message to Congress informing them that "the bill failed to become a law" because it had been presented to him "at an hour too near the close of the session to be returned for reconsideration." President Jackson took a like course in 1832 with a bill passed at the first session and presented to him and the Congress had adjourned within the ten-day period. President Tyler informed the Congress in 1842 that two bills had failed to become laws because presented within the period of ten days (Sundays excepted), but in the meantime the Congress had adjourned. As already said, we do not find a provision requiring the President to call attention to the fact that the bill has failed to become a law, though in the instances mentioned and perhaps in others such a course was pursued.

We conclude that the bill in question never became a law, and therefore that the demurrer should be sustained and the petition dismissed. And it is so ordered.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Judge*, concur.
GREEN, *Judge*, took no part in the decision of this case.

MAZER ACOUSTILE CO. v. THE UNITED STATES

[No. D-526]

On the Proofs

Statute of limitations; sec. 156, Judicial Code; informal contract; written order after discontinuance of work.—When an order discontinuing experimental work, conducted under an informal agreement, is given more than six years prior to commencement of suit against the United States for value of the services rendered and the goods furnished, the claim is barred by the statute of limitations, notwithstanding a written order for the work is issued subsequent to the order of discontinuance and within the statutory period.

The Reporter's statement of the case:

Mr. George W. Dalzell for the plaintiff.

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Decided April 23, 1928. Motion for new trial overruled October 8, 1928.

The court made special findings of fact, as follows:

I. The plaintiff, Mazer Acoustile Company, is a corporation under the laws of Pennsylvania.

II. On December 15, 1917, a letter was transmitted from the office of the Chief Signal Officer to the commanding officer McCook Field, Dayton, Ohio, upon the subject of "noise investigation," which stated (1) that it was desired by the Chief Signal Officer that Mr. Mazer, president of the plaintiff company, be given opportunity to inspect airplanes at McCook Field, and if possible, to make a flight with the view of making a study in the matter of the elimination of noise from the head helmets of radiotelephone operators on airplanes; (2) that a copy of this letter was being forwarded to Mr. Mazer, who was expected to call at McCook Field for the purpose of conducting the investigation mentioned.

III. Whether Mr. Mazer went to McCook Field does not appear. He did call at the office of the Chief Signal Officer and suggested he might be able to change the design of the radio-receiving helmet for use on airplanes with reference to excluding external sounds, and on April 26, 1918, there were delivered to him two aviation special head helmets for the purpose of experimental and development work in connection with the radio-communicating feature of this helmet. On May 2, 1918, the plaintiff company, by its president, addressed a letter to Col. Slaughter, Chief Signal Officer, stating that the company had received the two head helmets above mentioned and had learned from Mr. Miller, who had delivered them, that the plaintiff "could possibly obtain two sets of telephonic apparatus to be used in connection with the head helmets," and that with these it was believed the plaintiff "could experiment to better advantage." It was also stated that in the meantime the plaintiff had been "working on the helmets and on tests in connection therewith." The additional apparatus mentioned was requested, and the letter added: "We have not yet received

the formal confirmation of your authority to proceed with this work and to spend a sum not to exceed $1,000, with instructions as to how you desire bills and reports to be rendered."

IV. On May 16, 1918, plaintiff sent a letter to the Chief Signal Officer of the Army in which it was stated that on the suggestion of Mr. Miller, who had delivered to plaintiff the two head helmets above mentioned, plaintiff had "installed an intercommunicating phone" in connection with the helmets, that some tests had been made and others would be made; that it had made a crude helmet upon which some changes would be made, and that the plaintiff hoped to be able to inform the Signal Office "within a very few days that we are ready for the preliminary test." Acknowledging receipt of this letter of May 16 the Chief Signal Officer, through Col. Curtis, on May 20, 1918, requested plaintiff or its president "as soon as the samples referred to are ready they be delivered to Captain Gray" at a designated place in Washington, D. C. On May 28, 1918, Col. Curtis, from the office of the Chief Signal Officer in Washington, wrote plaintiff (1) that the helmets plaintiff had submitted "in connection with development work on soundproof telephone receivers" had been examined and would be further tested later; (2) that "developments in other places have so far progressed that it has been decided to discontinue the further work that you have planned," and it was added: "It is therefore requested that you cease all activities on this problem and that you present bills in duplicate as directed on the order you have received." At that time the "order" had not been issued but one was issued thereafter on July 17, 1918, mentioned later in these findings.

V. Prior to the date of the letter mentioned in Finding II the plaintiff or its president had proposed that that company design an aviation radio helmet free from certain disadvantages in the types of helmets then in use, and the officers of the Signal Corps were skeptical of the ability of the plaintiff to overcome the disadvantages referred to, but agreed "to permit the Mazer company to endeavor to develop a satisfactory helmet." The plaintiff submitted a crude

sample for the inspection and testing by the Army officers and engineers, and this sample was found unsatisfactory. The plaintiff failed to submit to the War Department any experimental data or useful contributions relating to aviation radio helmets as a result of its investigation or tests. The plaintiff was requested to furnish such data. The helmet submitted by plaintiff to the Signal Corps was of large size and too heavy for practical use; its weight was too much and it was not provided with means of ventilation.

VI. On June 7, 1918, the plaintiff acknowledged receipt of the letter from Col. Curtis dated May 28, 1918 (Finding IV), and stated: "As yet we have not received the confirmation of the order given us to proceed with this development work. As soon as instructions on the order are received we shall promptly send our bill as directed." On July 5, 1918, the office of the Chief Signal Officer, through Col. Curtis, wrote the plaintiff that in connection with the development work undertaken for the Signal Corps it was understood the plaintiff was to submit a report covering all technical details of the work done by plaintiff on the order; that the report had not been received and it was requested that it be forwarded to Col. Slaughter, radio development section, Arcade Building, Washington; that it was understood the report involved no additional expense other than that covered by the original order, and that payment for the services performed was contingent upon the presentation of a satisfactory report.

VII. Under date of July 17, 1918, there was issued from the office of the Chief Signal Officer, War Department, order No. 130202, as follows:

WAR DEPARTMENT,
OFFICE OF THE CHIEF SIGNAL OFFICER,
Washington, July 17, 1918.

From: Office Chief Signal Officer.
To: Mazer Acoustile Co., 525 Third Ave., Pittsburgh, Pa.
Subject: Order for services.

In accordance with your standard Government price (HSW), order with you for the articles listed below is hereby placed.

Inspection: Goods must be inspected before shipment unless otherwise specified. Inspection at destination.

Delivery: Goods must be securely packed and delivered to consignee at your expense by August 1st, 1918.

Bill upon Forms 330A and 29, inclosed, observing carefully the instructions on the reverse side of Form 330A.

Shipping instructions and marking: Officer in charge, General Supply Depot, Signal Corps, 10th & B Sts. SW., Washington, D. C.

Marked: "Order 130202 S. C. for Radio Development Department, War Plans Division, Arcade Building, 14th & Park Road, Washington, D. C."

Item 1. Services for development work to cover development of sound-proof helmets. Samples to be submitted to the Radio Development Department for inspection and test. Cost not to exceed $1,000.

GEORGE O. SQUIER,
Major Gen. C. S. O.
By L. J. DE MILHAU,
Capt. A. S. Sig. S. C.

At the time this order was issued the services had already been rendered. No further service was rendered by plaintiff under this order except the rendition of the bill for services mentioned in Finding III. The report requested in the letter mentioned in Finding VI was never received by an officer of the Signal Corps. The plaintiff and its president did not understand from the early communications that such a report was expected. The voucher prepared after July 17 and before July 31, 1918, and forwarded by plaintiff is as follows:

"WAR DEPARTMENT,
"SIGNAL CORPS, U. S. ARMY.

"Disbursing officer's invoice and receipt of Signal Corps property transferred. The United States to Mazer Acoustile Company, 4765 Liberty Avenue, Pittsburgh, Pa., Dr.

"Date of delivery or service, June 14, 1918.

Article or service:	Amount
Felt and fabric materials	$16.05
Castings	6.64
Tailor	24.90
Tailor	10.50
Tailor	14.20
Leathersmith	14.00
Sheet-metal worker	30.30
Pattern worker	6.20

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Article or service—Continued.	Amount
Use of laboratory and shop, 16 days @ $10.00	$160.00
Traveling expense	37.00
Acoustical engineer, 16 days @ $30.00	480.00
Acoustical engineer, 10 days @ $20.00	200.00
Total	999.79

Mechanic, 2 days @ $10.00 (charge canceled).
Laboratory assistant, 21 days @ $5.00 (charge canceled).
As authority was given for expenditure of only $1,000.00, we have canceled the last two items of our bill, so the total does not exceed that amount.

"Shipped to Capt. G. Francis Gray, 1212 G Street NW., Washington, D. C.

"Order No. 130202 S. C. for radio development dept., War Plans Division, July 17, 1918.

"Authority: George O. Squier, major gen., C. S. O., by L. J. Milhau, capt., A. S. Sig., S. C."

On August 5, 1918, Capt. Gray notified the office of the Chief Signal Officer, in reply to the latter's inquiry of July 31, that the shipment by plaintiff made June 14, 1918, by parcel post was received, but that "report not yet received from manufacturer." On August 8, 1918, the office of the Chief Signal Officer notified the plaintiff that approval of voucher submitted on order No. 130202 was being withheld pending receipt of a complete report from the plaintiff. The voucher was not paid or approved and the matter rested, so far as the record discloses, until August, 1920, when plaintiff's representative called at the office of the Chief Signal Officer relative to the status of the matter and was informed that in the absence of the report mentioned it was not felt that the said voucher was available for payment. The matter was taken up with the Secretary of War, who, on September 7, 1920, wrote the plaintiff's president recounting the material facts above stated, and confirmed the action of the Signal Corps relative to payment, adding that the whole matter of final adjustment under the order was in the hands of the Chief Signal Officer and if the latter was communicated with the plaintiff would "find there every disposition consistent with proper protection for the interests of the Government to settle the matter on a fair basis."

VIII. There is a stipulation, signed by the plaintiff's attorney and the Assistant Attorney General, that certain

correspondence and statements in letters and by officers attached to the stipulation contain the facts of the case; that the services for which suit was brought "were rendered in pursuance of informal agreement with officers of the Signal Corps of the United States Army," and that this agreement was followed by the said order No. 130202, and (7) "That the sum of $500 would represent fair and reasonable compensation to the plaintiff for the services performed in pursuance to order No. 130202 referred to herein as Exhibit A."

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

When the written order of July 17, 1918, was issued all the services which were at any time rendered by the plaintiff had been performed. Such services had been rendered in pursuance of what is called an "informal agreement." The development work "to cover development of sound-proof helmets" called for in this written order, so far as the evidence shows, found expression in the submission to the designated officer of the Signal Corps of a crude sample for inspection and testing which was not satisfactory or useful. No report covering details was made by plaintiff, though the same was requested on July 5, 1918, and afterwards. The plaintiff's president did not understand that a report was to be made, and the order in writing dated July 17, 1918, did not mention such a report. It seems manifest that if one party understood that the report was to be made and the other party understood differently there was no meeting of the minds, a feature necessary in contracts. The plaintiff was one of a number of persons engaged in the same line of work and experimentation having to do with the development of sound-proof helmets, and on May 28, 1918, was informed that other developments had so far progressed that it had been decided to discontinue the work, and it was requested to cease activities "on this problem" and present its bill "as directed by the order which you have received." As already stated, no such "order" had been received, but a test helmet had been delivered. Plainly the plaintiff's

Syllabus

cause of action, if it be conceded there was a cause of action, accrued when the notice of May 28, 1918, to discontinue its efforts was given, and when it was operating under the so-called informal agreement. More than six years afterwards this suit was brought, the petition being filed July 17, 1924. The claim is barred by the statute of limitations, which in this court is jurisdictional. The written order issued July 17, 1918, does not relieve the situation. At most, it is but evidential of the "informal agreement" under which the plaintiff had proceeded before it was issued. In the language of the stipulation, it followed "the informal agreement," and nothing substantial was done under the written order.

2. It may be stated that where services were rendered or goods delivered to the Government under an informal agreement an action may be maintained and recovery had *in quantum meruit* or *quantum valebant*. In such case proof is allowed to be adduced as to the value of the services or goods. After a contract has been performed compliance with section 3744 Revised Statutes is immaterial. *United States* v. *Andrews & Co.*, 207 U. S. 229. While immaterial in the view we have of the case, it may be added that the value of the service is stated in the stipulation without any sustaining proof in the record. Why this claim was not presented as a Dent Act claim it does not appear. We are satisfied that it is barred by the statute of limitations. For the reasons assigned above the petition should be dismissed. And it is so ordered.

WESTERN UNION TELEGRAPH CO v. THE UNITED STATES

[No. D-5]

On the Proofs

Telegrams at Government rates; contractor acting for the United States.—Telegrams sent by a Government contractor, made the agent of the United States for that among other purposes, upon Government business, are subject to the reduced rates fixed by the Postmaster General pursuant to section 2, act of July 24, 1866.

Same; unpaid account stated at commercial rates; settlement for Federal control.—Where an agent of the Government, before the intervention of Federal control on August 1, 1918, sent messages on Government business over plaintiff's telegraph lines, and the plaintiff, claiming the messages were not subject to Government rates, charged the agent on its books with the full commercial rates, and in settlement at the end of Federal control the account, still unpaid but which the Government was ready and willing at all times to settle at the rates prescribed by the Postmaster General pursuant to section 2 of the act of July 24, 1866, and not otherwise, was passed back to the plaintiff at its "face value," the circumstances do not establish the validity of the account at the commercial rate.

The Reporter's statement of the case:

Mr. Paul E. Lesh for the plaintiff. *Mr. Frances R. Stark* was on the briefs.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Decided May 28, 1928. Motion for new trial overruled October 8, 1928.

The court made special findings of fact, as follows:

I. On the 18th day of January, 1918, the defendant made a contract with Thompson-Starrett Company, a corporation organized under the laws of the State of New York, wherein it was agreed that the said corporation designated in said contract as the construction manager, should cause to be planned, erected, and installed at a place near Charleston, West Virginia, subsequently called Nitro, upon land of the defendant, a "plant" for the production of smokeless powder, and wherein it was agreed that the defendant should "bear the entire costs of the designing and construction of said plant and will supply all the money necessary therefor in such amounts and in such manner as to allow the activities with respect to the designing and construction of the plant to proceed without delay or interruption"; and that a disbursing officer should be appointed by the defendant and "provided with the necessary funds to meet all payments as due upon presentation by the construction manager of bills approved by the special director," who was one D. C. Jack-

ling, who had been authorized by the defendant to act as such special director; and in said contract it was further provided that "with the written approval of the special director obtained from time to time, the construction manager" was "empowered and authorized to make, as agent for the United States of America, all contracts for services, labor, supplies, material, equipment and facilities necessary for use for the benefit of 'the plant'"; and it was further "understood that the construction manager, in dealing with persons other than the United States of America, shall make all contracts, purchases, and other arrangements for the performance of this contract in its capacity, as agent for the United States of America, and without liability on the part of the construction manager or special director under any contracts or purchases so made"; and it was provided that compensation for services performed and payments thereunder should be submitted to the special director for approval or ratification, and upon such approval or ratification the defendant would promptly provide and pay the amounts required therefor; and in said contract it was provided that the defendant would pay the said Thompson-Starrett Company, in addition to the cost of the aforesaid services and materials, and as compensation to it as construction manager, a certain fixed sum of money; and that said construction manager should furnish to the defendant a bond in the penalty of a sum of money conditioned for the full and faithful performance of the contract, and charge the premium to the cost of the work; and that the construction manager should procure liability insurance protecting it against claims on the part of employees and the public and charge the premiums to the cost of the work; and it was provided that said contract should bind and inure to the benefit as well of the successors to the construction manager.

II. In the course of the construction of the said powder plant at Nitro, West Virginia, under its said contract with the United States, of January 18, 1918, the Thompson-Starrett Company, claiming to act in accordance with said contract and in the performance thereof, employed the Western Union Telegraph Company from time to time to

transmit and deliver telegraphic messages, and the said Western Union Telegraph Company did transmit and deliver messages pursuant thereto between January 1, 1918, and July 31, 1918, at tolls which computed at the legal commercial rates in effect during that period amounted to $44,-440.37, and which computed at the rates in effect during that period as fixed for "Government" messages by the Postmaster General pursuant to law (Revised Statutes, section 5266) amounted to $20,597.07. Said messages were sent about the business of the construction of said plant and related thereto. These messages were specifically charged against the Thompson-Starrett Company by name on the books of the Western Union Telegraph Company in the account styled "accounts receivable" at the legal commercial rates, viz, $44,440.37.

III. In pursuance of the joint resolution of Congress approved July 16, 1918 (40 Stat. 904), the President of the United States on July 22, 1918, issued a proclamation whereby he took possession and assumed control and supervision of all the telegraph and telephone lines and systems within the jurisdiction of the United States, including all equipment and appurtenances thereto, and all materials and supplies, and directed that the supervision, control, and operation of said telegraph and telephone lines by him undertaken should be exercised by and through Postmaster General Albert S. Burleson. Pursuant to said proclamation Postmaster General Albert S. Burleson on August 1, 1918, by his order No. 1783, directed that the said telegraph and telephone lines over which he had assumed possession, control, and supervision should continue operation in the ordinary course of business through regular channels.

IV. During the period of Government control and operation of the telegraph system of the Western Union Telegraph Company, that is to say, between the first day of August, 1918, and the 29th day of April, 1919, and in the course of the construction of said powder plant the Thompson-Starrett Company, claiming to act in accordance with its said contract and in the performance thereof, from time to time employed the telegraph system of the Western

Union Telegraph Company to transmit and deliver messages, and the said telegraph system controlled and operated by the Government as aforesaid, did transmit and deliver telegraphic messages, the tolls of which computed at the legal commercial rates in effect during said period amounted to $50,842.75, and the said tolls computed at the rates in effect during said period as fixed for "Government" messages, as aforesaid, amounted to $23,550.41. Said messages were sent about the business of the construction of said plant and related thereto. These messages were specifically charged against the Thompson-Starrett Company by name on the Federal books of the Western Union Telegraph Company in the account styled "accounts receivable" at the legal commercial rates, viz, $50,842.75.

V. During the period of Government control and operation of the telegraph system of the Western Union Telegraph Company between the 22nd day of November, 1918, and the 29th day of April, 1919, and in the further course of the construction of the said powder plant the Thompson-Starrett Company, claiming to act in accordance with the said contract and in the performance thereof, employed from time to time the telegraph system of the Western Union Telegraph Company to transmit and deliver messages, and the said telegraph system while controlled and operated by the Government, as aforesaid, transmitted and delivered telegraphic messages, tolls of which computed at the legal commercial rates in effect during that period amounted to $1,738.79, and the said tolls computed at the rates in effect during that period as fixed for "Government" messages, as aforesaid, amounted to $695.52. Said messages were sent about the business of the construction of said plant and related thereto. These messages were specifically charged against the Thompson-Starrett Company by name on the Federal books of the Western Union Telegraph Company in the account styled "accounts receivable" at the legal commercial rates, viz, $1,738.79.

VI. The tolls upon the messages referred to in Paragraphs II and IV of these findings of fact have not been paid to the plaintiff by the defendant, nor by the Thompson-

Starrett Company, due to a controversy which arose between the Thompson-Starrett Company and the Government disbursing officer on the job on the one hand and the Western Union Telegraph Company on the other, the former taking the position that the said messages should be billed and paid for at the Government rate fixed by the Postmaster General under statutory authority (Revised Statutes, section 5266), and the Western Union Telegraph Company insisting that it was entitled to be paid at the commercial rate in effect at the time said messages were sent. The tolls upon the messages referred to in Paragraph V of these findings of fact were paid by the Thompson-Starrett Company to the plaintiff at the commercial rate in the aforesaid aggregate of $1,738.79, under the circumstances following:

VII. Said messages so paid for at the commercial rate were as aforesaid transmitted and delivered during the period of the Government control and operation of the telegraph system of the plaintiff, which control was exercised through the Postmaster General, and the said Postmaster General directed that said messages should be charged for at commercial rates, subject to adjustment if it should be decided by a competent authority that Government rates applied to them, and the agents of the plaintiff's telegraph system under the direction of said Postmaster General agreed with said construction manager and said special director, the duly authorized agents of the defendant in said transaction, that in respect of all messages sent after November 20, 1918, payment would be made to the plaintiff at commercial rates and the difference between commercial rates and Government rates would be reimbursed if and when it should be decided by a competent authority that Government rates applied, and the payments made to the plaintiff at commercial rates, as aforesaid, were made pursuant to this arrangement.

VIII. During the course of the construction of said powder plant, and on or about February 21, 1918, the special director caused to be transmitted to the construction manager blank forms to be used by the construction manager in transmitting telegraphic messages in connection with the construction of the said powder plant. This form indicated on its

face that the Government rates were demanded on all messages submitted on it. The plaintiff declined to accept messages offered by the construction manager at Government rates and caused to be deleted the words indicating acceptance at Government rates of such of said messages as were filed on the aforesaid form. Messages continued to be filed by the construction manager, and continued to be transmitted and delivered by the plaintiff, without a determination of the matters of rate; bills were rendered monthly by the plaintiff at commercial rates to the construction manager and were presented to the defendant's disbursing officer at the plant for payment, and were uniformly disapproved (until after November 20, 1918, as hereinabove appears), on the ground that they should have been rendered at the Goverment rate instead of at the commercial rate. Said disbursing officer was ready and willing at all times to pay the tolls on said messages at Government rates, but this basis of payment the plaintiff declined to accept. The tolls at the commercial rate demanded and payment refused, and the tolls at the Government rate offered and declined, were the sums set out in Paragraphs II and IV of these findings as the amount of tolls calculated at the commercial and Government rates, respectively. This procedure on the part of Thompson-Starrett Company and the disbursing officer was followed with the knowledge and approval of D. C. Jackling, special director; and said special director demanded in writing of the plaintiff (until after November 20, 1918, as hereinabove appears) that it render the telegraphic service here claimed for, insisting upon the basis of an opinion from the Judge Advocate General, that the Government rate was applicable.

IX. On October 9, 1918, Postmaster General Albert S. Burleson entered into a contract with the plaintiff for the payment of compensation in respect of the supervision, possession, control, and operation of the telegraph system of the plaintiff, which commenced, as aforesaid, at midnight on July 31, 1918, in which contract it was agreed that the telegraph system of which supervision, possession, control, and operation had been taken, included the land lines and cables, materials on hand, the net balance as of midnight,

July 31, 1918, in the accounts shown on the books of the plaintiff under the uniform system of accounts prescribed by the Interstate Commerce Commission, including, among others, account "number 111, due from customers and agents," also $3,000,000 in cash working capital; and wherein the method of operation and accounting during the period of Government control was agreed upon; and wherein the method of payment for repairs and additions to said system was provided; and wherein it was agreed that the Postmaster General should pay to the plaintiff, for each year during the period of Federal control, an amount equal to the sum of several items in said contract, enumerated, including interest upon the bonds and obligations of the plaintiff outstanding, excepting bills payable, and also the sum of $7,985,070.87; and wherein it was agreed, in general, that expenses incurred and revenues earned should be allocated as between the plaintiff and the Postmaster General, dependent upon whether they were incurred or earned before or after midnight of July 31, 1918; and wherein it was provided that the Postmaster General should pay or save the plaintiff harmless from all expenses incident to or growing out of the possession, operation, and use of the property taken over during the period of Federal control, excepting obligations of the owner to the Postmaster General; and wherein the return to the plaintiff at the end of the period of Federal control of the property taken over at the beginning thereof was provided for, that is to say, of the aforesaid telegraph lines, materials, and supplies, or their value, and an amount of money equal to the cash working capital, without interest, received by the Postmaster General from the plaintiff.

X. Among the amounts included in the aforesaid account "number 111, due from customers and agents," so taken over by the Postmaster General as of midnight, July 31, 1918, was the account receivable aforesaid charged against the Thompson-Starrett Company on the books of the plaintiff for the services rendered as stated in Paragraph II of these findings of fact, amounting to $44,440.37, or thereabouts, the difference between the amount appearing

in said account and the said amount being accounted for by errors and corrections not here material.

This identical account was returned to the plaintiff upon the termination of the supervision, possession, control, and operation of the property of the plaintiff company by the Federal Telegraph Administration, and under the final settlement of June 1, 1920, referred to in Finding XIII, hereof, this account was one of those "corresponding accounts" which, having been taken over by the defendant at its "face value," was passed back to the plaintiff at "its face value."

XI. During the period of Federal control in respect of the services rendered by the plaintiff set forth in Paragraph IV of these findings of fact, the amount due in respect of said services calculated at the commercial rate was carried upon the books kept by the said Postmaster General in respect of the operations of the telegraph system of the plaintiff, the total amount thereof increasing from month to month until at the close of April, 1919, and on July 31, 1919, the said account on the books kept by the Postmaster General amounted to the sum of $95,283.12, or thereabouts, the difference between the amount appearing in the said account and the said amount being accounted for by errors and corrections not here material.

XII. In pursuance of the act of Congress approved July 11, 1919 (41 Stat. 157), and by direction of the President, Postmaster General Albert S. Burleson, by his order No. 3380, dated July 30, 1919, effective at midnight July 31, 1919, returned to the plaintiff the telegraph and telephone system, lines, and property theretofore taken over by the Government.

XIII. On October 11, 1919, Newcomb Carlton, president of the plaintiff company, by and through a letter signed by him, presented to the Postmaster General a proposition for settlement of the claims of the plaintiff under the contract made with the Government. This proposal provided for the acceptance as facts of certain statements made therein which are not here material, and for the waiver by plaintiff

of certain items therein set out, and in respect to accounts receivable provided:

" That the accounts receivable and accounts payable on the books of the company as of midnight July 31, 1918, and the corresponding accounts on the books of the Federal Telegraph Administration as of midnight July 31, 1919, will be passed from one to the other at their face value."

It also contained the further provision that:

"For the purpose of arriving at a quick settlement of accounts and to avoid the delay and expense, which would result from an examination of the records extending over a considerable period, the company is willing to enter into an arrangement which would release the Government from the obligations of financing plant extensions, $6,424,866, of assuming notes payable, $9,600,300, and of meeting the unsettled legal expenses and damage claims, $141,500, arising during the period of Federal operation, referred to, and to accept the sum of $921,511, with interest thereon at 5 per cent from August 1, 1919, until paid, in full and complete satisfaction of all claims the company may have under the contract. This proposal is upon the express condition that this amount shall be actually paid to the company within not less than one year from October 1, 1919."

On June 30, 1920, the Postmaster General wrote Mr. Carlton, as president of the plaintiff company, a letter stating in substance that the proposition contained in his letter of October 11, 1919, was accepted.

XIV. Attached to the said letter written by the president of the plaintiff company, referred to in Finding No. XIII, was a statement showing the calculation by which the sum of $921,511.00 was determined, which statement was as follows:

The Western Union Telegraph Company Federal income statement period of Federal control, August 1, 1918, to July 31, 1919

	Item	Amount
1.	Revenue from transmission	$78, 114, 692
2.	Operations other than transmission	3, 444, 075
3.	Less contract payments to transportation companies	1, 807, 654
4.	Total telegraph operating revenues	79, 751, 113
5.		0

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	Item	Amount
6.	Plant department expenses (principally current maintenance)	$8,578,414
7.	Depreciation of plant and equipment	4,090,909
8.	Traffic expenses	25,323,593
9.	Commercial expenses	27,679,176
10.	General and miscellaneous expenses	1,805,158
11.	Total telegraph operating expenses	67,477,250
12.	Net telegraph operating revenues	12,273,863
13.	Add; miscellaneous income	173,874
14.	Total (lines 12 and 13)	12,447,737
	Deduct:	
15.	Uncollectible operating revenues	396,207
16.	Taxes	2,019,354
17.	Rent and other miscellaneous deductions	734,427
18.	Amortization of intangible capital (excluding franchises and patents) and right of way	0
19.		0
20.	Total deductions (lines 15 to 19. inclusive)	3,149,988
21.	Balance (before accrual of fixed charges under section 7 (a) of contract (line 14 less line 20))	9,297,749
22.	Compensation as per contract	10,219,260
23.	Balance (deficit) as of July 31, 1919	921,511

New York, Oct. 11, 1919.

Included among the revenue from transmission by telegraph during the period of Federal control, making up the total of $78,114,692.00, which was item No. 1 of the above statement, was the sum of $50,842.75 as tolls upon the messages described in No. IV of these findings of fact.

The court decided that plaintiff was entitled to recover the sum of $44,147.48, less the defendant's counterclaim of $1,043.27, leaving a balance of $43,104.21.

GREEN, *Judge*, delivered the opinion of the court:

This case grows out of the construction of a nitro-powder plant by the defendant under the direction of the Thompson-Starrett Company, as an agent for the United States. In the course of the operations connected with the construction of this plant the Thompson-Starrett Company had a large number of telegraphic messages sent over the lines of the plaintiff. Subsequent to beginning this construction the

defendant acting under its war powers took over the control and operation of the telegraph lines of plaintiff, and entered into a contract with plaintiff to compensate it for this action on terms stated therein. Part of the telegrams in question were sent before the Government took control of the lines of the plaintiff, and part during the time when these lines were operated by the Government, but the time when they were sent is not material to the decision of the case. No payment was made for any but a comparatively small number of the telegrams so sent, but the defendant admits that it is properly chargeable with the tolls for such telegrams as have not been paid for at what is known as the "Government rate"; that is, the rate fixed by the Postmaster General in pursuance of the statute, and the defendant has at all times been ready and willing to pay for the same at such rate. The plaintiff claims that the defendant should pay for sending these telegrams at the "legal commercial rate." There is no dispute as to what the Government rate is, or the commercial rate. The issue in the case is which rate should be paid by the defendant for the telegrams in question.

The plaintiff in its amended petition sets up three causes of action, all based primarily upon services rendered in transmitting the telegrams to which reference has been made.

The first cause of action pleads in substance that the defendant is estopped to deny its liability for the legal commercial rate upon the telegrams in question by reason of what is alleged to be a representation that these accounts were valid and collectible in the sums charged upon the books, and that the plaintiff relied upon such representation.

The second cause of action is based upon an alleged mutual mistake made in the settlement between the parties.

In a third cause of action the plaintiff seeks to recover from the defendant the reasonable value of the services rendered in transmitting telegrams before Government control, and also after control had been taken by the Government.

The third cause of action will be considered first, for if it is decided in favor of the plaintiff, it will be unnecessary to consider the other two.

The defendant admits that it is liable on account of the telegrams having been sent by its agent, the Thompson-Starrett Company, and the question in connection with the third account is whether the Thompson-Starrett Company acted in such a capacity that the defendant is entitled to what is considered the Government rate.

The so-called Government rates are fixed annually by the Postmaster General pursuant to section 2 of the post roads act of July 24, 1866 (14 Stat. 221), and this statute provides for the transmission of messages not only by the departments of the Government of the United States, but by their officers and agents. The act has universally been construed to apply to all messages sent on official business of the Government where solely in its interest and behalf, and chargeable to the United States.

That the Thompson-Starrett Company was not only an agent of the Government but merely an agent so far as the sending of these telegrams was concerned, seems almost too clear for argument or discussion. Under the contract between it and the Government it was "authorized to make, as agent for the United States of America, all contracts for services, labor, supplies, material, equipment and facilities necessary for use for the benefit of the 'plant,'" and it was further provided that as construction manager it should "make all contracts, purchases, and other arrangements for the performance of this contract in its capacity as agent for the United States and without liability on its part under any contracts or purchases so made."

A very simple test will determine the question here involved. Either the Thompson-Starrett Company was liable for the expense of these telegrams; or the Government, by reason of the telegrams having been sent in its behalf, by its agent, and solely in its interest and upon its responsibility, was liable. If this does not establish such an agency as to entitle the defendant to the Government rate it is difficult to see what would. There is no claim that the Thompson-Starrett Company was liable and the agency of this company was such as to entitle the defendant to the

Government rate unless some one or more of the other pleas of the plaintiff are established.

Turning now to the first cause of action stated in the petition, it appears, as before stated, that it sets up an estoppel against the claim for the Government rate. This alleged estoppel is based on the settlement made between the parties. The evidence shows that the plaintiff through its president, submitted to the Postmaster General, acting for the defendant, a proposition to accept $921,511 "in full and complete satisfaction of all claims the company may have under the contract" which existed between the defendant and the plaintiff when the Government took over the operation of the telegraph system. Attached to the letter which contained this proposition was a statement set out in Finding XIV which shows the calculation through which this particular sum of $921,511 was obtained. An examination of this statement in connection with the other evidence makes it plain that there was included in the first item thereof, to wit, "Revenue from transmission," the sum of $50,842.75, being the amount of tolls unpaid on messages sent during the period of Government control. So also when the Government took over the system of the telegraph company there was charged against the Thompson-Starrett Company on the books of the plaintiff the sum of $44,440.37 as tolls upon the messages sent by the Thompson-Starrett Company prior to the time of Government operation. So far as the bookkeeping is concerned, the whole matter may be summed up by saying that both prior to and during the period of Government control the messages sent by the Thompson-Starrett Company were charged against that company on the books of account at the legal commercial rate. When the Government took over the telegraph system it received the books of account with these charges thereon and when the system was turned back to the telegraph company the accounts were turned back in the same manner. All through this period the Government was insisting through its agents that it was entitled to the special rate. At the very start, the Thompson-Starrett Company presented the telegrams

upon a special form that indicated that the telegrams were accepted to be paid for at the Government rate. Plaintiff refused to accept the telegrams in this form and instead charged the regular rate. Even as to the telegrams for which payment was made during Government control, there was an express understanding that if it should subsequently be determined that the defendant was entitled to the Government rate the overpayment should be refunded.

Conceding for the sake of the agreement that the Government might be subject to an estoppel, it must be borne in mind that an equitable estoppel always involves some act, representation, or admission, whereby the party claiming the benefit of it was misled into acting to his disadvantage, but there is no evidence of any act or statement whereby the plaintiff was misled. The claim on behalf of the Government was continuous to the last and there was nothing in the proceedings relating to the settlement which indicated any intention to waive or abandon it. The letter of the president of the plaintiff stated that the proposition to accept a definite amount was made "For the purpose of arriving at a quick settlement of accounts and to avoid the delay and expense, * * * the company is willing * * * to accept the sum of $921,511 * * * in full and complete satisfaction of all claims the company may have under the contract." The reply of the Postmaster General, divested of all verbiage, amounted merely to an acceptance of this proposition and nothing more. The only thing that was said with reference to the accounts in the course of the settlement is found in the plaintiff's letter which contained the proposition:

"That the accounts receivable and accounts payable on the books of the company as of midnight July 31, 1918, and the corresponding accounts on the books of the Federal Telegraph Administration as of midnight July 31, 1919, will be passed from one to the other at their face value."

We do not think that in a contract of settlement such a statement is sufficient to establish the right of the plaintiff to recover the full commercial rate. On the contrary, it would seem to imply that it was understood that there was

a dispute as to some of these items which must be left for the courts to determine or to be settled otherwise. This agreement was made for the purposes of the settlement alone. The whole tenor of plaintiff's proposition indicated that the plaintiff was willing to make concessions in order to obtain a "quick settlement," and the settlement only related to the operating contract between the plaintiff and defendant. The plaintiff can not now go further and claim that not only the amount due under the operating contract but other matters were settled at the same time, such as the rate to be paid for the telegrams. We find that no estoppel was created.

In the remaining cause of action the plaintiff seeks to recover on the ground of mutual mistake, if (according to the language of the petition) the settlement did not imply a warranty entitling the plaintiff to recover the commercial rate.

It is quite possible that at the time the proposition of settlement was made on behalf of the plaintiff it was thought by the president of plaintiff that if the accounts should "be passed from one to the other at their face value" it would even matters between the parties regardless of how the dispute as to the rate was finally determined, whereas it is now quite evident that such is not the case. But a mistake of this character, even if it were mutual, is not such a mistake that the courts will grant relief against it. It is a mistake of law, not of fact; and the same is true even if the plaintiff's officers mistakenly believed that the provision above set out established the validity of the accounts in question at the commercial rate. Beyond this it should be said that in either case there is no evidence that the mistake, if any, was mutual. On the contrary so far as the evidence goes, it tends to show that, on behalf of the Government, it was insisted from first to last that it was entitled to the special rate.

There remains for disposition the counterclaim of the defendant. We are unable to see why the same rules would not apply. The money that was paid as tolls on these telegrams while the Government was in control eventually went

into the Treasury of the plaintiff, and it was paid with the express understanding that if it should subsequently be found that the Government rate was applicable thereto the overpayment should be refunded. The counterclaim should therefore be sustained. The Thompson-Starrett Company paid for these telegrams, as agents for the Government, $1,738.79. At Government rates the charge would have been $695.52. The defendant, therefore, is entitled to recover the difference, which is $1,043.27, and in making up final judgment it is entitled to have this sum credited on the amount admitted to be due on the telegrams which were not paid for, which is $44,147.48, leaving a net amount due from the defendant to the plaintiff of $43,104.21, for which judgment will be entered in favor of the plaintiff.

MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

FEATHER RIVER LUMBER CO. v. THE UNITED STATES [1]

[No. F-68]

On the Proofs

Refund of income tax; requirement of claim; prerequisite to suit.—A claim for refund of income tax submitted to the Commissioner of Internal Revenue must, under the revenue laws and regulations, show the errors complained of, before the taxpayer can maintain suit, and a claim for refund of 1918 taxes solely on account of depreciation and depletion, does not have the necessary particularity for a claim for refund of 1918 taxes on account of a net loss in the year 1919.

The Reporter's statement of the case:

Mr. George E. H. Goodner for the plaintiff. *Matthews & Trimble* were on the brief.

Mr. Frederick W. Dewart, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Lisle A. Smith* was on the brief.

[1] Certiorari denied.

Decided May 28, 1928. Motion for new trial overruled October 8, 1928.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation organized and existing under the laws of the State of Colorado and having its principal office at Denver, Colo.

II. Plaintiff was incorporated on January 25, 1905, and ever since said date has been engaged in the business of cutting timber and sawing the logs into lumber and marketing same.

III. Plaintiff filed a timely income-tax return for the calendar year 1918 and reported therein taxable net income of $27,066.90 and a total tax liability thereon of $3.008.03, which tax was duly assessed by the Commissioner of Internal Revenue and paid by plaintiff.

IV. Upon audit of plaintiff's 1918 return the commissioner found the taxable net income to be $26,016.22 and the tax liability to be $2,881.95. Thereafter the commissioner caused a certificate of overassessment, No. 625432, to be issued showing an overassessment for 1918 of $126.08. Exhibit A attached to plaintiff's petition and made a part of this finding by reference, is a correct copy of said certificate of overassessment, which said certificate was received by plaintiff, accompanied by a Treasury warrant for $126.08, on or about April 15, 1924.

V. On or about the 15th day of March, 1920, plaintiff filed its income-tax and excess-profits tax return for the year 1919, a correct copy of which return is annexed to plaintiff's petition as Exhibit B, and made a part of this finding by reference.

VI. On March 14, 1924, plaintiff filed with the collector of internal revenue for the district of Colorado a refund claim prepared on Treasury Department Form 843, demanding refund of the total tax paid for 1918. Exhibit C attached to plaintiff's petition is a correct copy of said claim, and made a part of this finding by reference. More than six months elapsed between the filing of said claim and the filing of the petition herein. No other claim for refund of

any part of the taxes paid by plaintiff for the year 1918 was filed.

VII. The commissioner arrived at the taxable net income for 1918 of $26,016.22 and the total tax liability of $2,881.95 without giving any deduction for a net loss in the year 1919 under section 204 of the revenue act of 1918 (40 Stat. 1060).

VIII. The total income tax paid to the collector of internal revenue by plaintiff for 1918 was $3,008.03, of which $126.08 has been refunded as aforesaid. The balance of said payment, to wit, $2,881.95, is still retained by the United States, and the Commissioner of Internal Revenue refuses to refund any part of same.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

On June 16, 1919, plaintiff filed its income-tax return for the year 1918 and paid the tax shown to be due, amounting to $3,008.03. On the 14th day of March, 1924, plaintiff filed a claim for the refund of said sum, setting forth the grounds as follows:

"Taxpayer's 1918 return has not yet been audited by the commissioner at Washington, D. C., but it appears from agreements reached in conference with representatives of the Bureau of Internal Revenue relative to depreciation and depletion that its 1918 taxes have been overpaid and that a refund is due. This claim is filed in order to protect taxpayer's rights under sections 252 and 1324 of the revenue act of 1921, because the right to claim refunds for 1918 will soon be barred by the statute of limitations."

The claim for refund was allowed to the extent of $126.08, which was paid. In March, 1920, plaintiff filed its income-tax return for the year 1919, which showed no taxable income, but a net loss of $4,891.15, as alleged by plaintiff; $3,331.15, as computed by defendant. On May 13, 1925, plaintiff, in a letter to the Commissioner of Internal Revenue, called attention to the fact that in arriving at the taxable income for 1918 the commissioner had not deducted the net loss for 1919, and requested a recomputation of

plaintiff's tax liability and a further refund of $586.94. Upon the refusal of the commissioner to grant plaintiff's request plaintiff instituted this action to recover said sum.

No claim for refund was ever filed by plaintiff other than the claim hereinabove set forth. The transactions out of which the claim sued on arose had transpired prior to the filing in 1924 of the claim for refund, and there was no mention of a claim on account of *net loss* in 1919. The claim merely stated that agreements had been reached by the taxpayer with the Government *relative to depreciation and depletion*, that its 1918 taxes had been overpaid, and that a refund was due. This claim, referring only to the question of *depreciation* and *depletion*, was duly considered and in part allowed. The first mention of the claim which constitutes the basis of this action was in the letter of May 13, 1925.

The purpose of requiring claims for refund as a condition precedent to the institution of an action to recover for taxes illegally or erroneously collected was to afford an opportunity for the bureau officials to correct errors arising through their own mistakes. Not until the Commissioner of Internal Revenue has been presented with a claim bringing to his attention the errors complained of, and has rejected same, or has allowed six months to elapse without taking action thereon, can the taxpayer invoke the aid of the courts. The mere showing of a *net loss* for the year 1919 is not sufficient. Plaintiff should have presented a claim for refund, stating its grounds therefor. There is no legal relation between the claim filed in 1924, as a claim for refund, and the claim which constitutes the basis of this action. While it has been held that the form of the claim for refund is not essential, there has been no deviation from the well-established rule that the aggrieved taxpayer must assert his right to a refund by an application to the commissioner containing the grounds upon which he relies for such recovery before he will be permitted to bring an action for same. See *Rock Island, Arkansas & Louisiana Railroad Company* v. *United States*, 254 U. S. 141, and cases cited therein. The question involved in this case presents an apt example for the application of the somewhat epigrammatic language of

Mr. Justice Holmes in the *Rock Island case*, "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued its conditions must be complied with." The petition will be dismissed, and it is so ordered.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

ABRAM MINIS, EXECUTOR, AND MARIA MINIS, EXECUTRIX, UNDER THE WILL OF LAVINIA F. MINIS, DECEASED, v. THE UNITED STATES [1]

[No. H-125]

On the Proofs

Estate-transfer tax; power of appointment by will; inclusion in gross estate.—Where by a deed of trust power to dispose of the trust estate is to be exercised "by a will duly made and executed," without other limitation, the power of appointment is, within the meaning of section 402 of the revenue act of 1921, general, and the value of the property passing thereunder is to be included in the testator's gross estate.

The Reporter's statement of the case:

Mr. William L. Clay for the plaintiffs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Decided May 28, 1928. Motion for new trial overruled October 8, 1928.

The court made special findings of fact, as follows:

I. Lavinia Florance Minis, who, before her marriage, was Lavinia Florance, died October 12, 1923, leaving a last will and testament dated January 25, 1910, and three codicils thereto, dated, respectively, March 18, 1910, February 4, 1916 and May 2, 1917.

II. Said will and codicils were duly proved in the Court of Ordinary, Chatham County, Georgia, the county of resi-

[1] Certiorari denied.

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dence of said testatrix, and were duly admitted to probate therein. The plaintiffs, Abram Minis and Maria Minis, duly qualified as executor and executrix under said will, and letters testamentary were duly issued to them and are now in full force and effect.

III. On October 15, 1851, Abram Minis, of Savannah, Georgia, and Lavinia Florance, of Philadelphia, Pennsylvania, in contemplation of a marriage about to be solemnized between them, executed a marriage settlement or deed of trust. The said marriage settlement or deed conveyed to one Isaac Minis or his duly appointed successors, in trust for the sole use and benefit of Lavinia Florance, not subject to her husband's debts, contracts, or liabilities, all of her property both real and personal which she then possessed or of which she might thereafter become possessed by gift or otherwise from her father, Jacob L. Florance. Among the trusts enumerated was the following:

"Upon this further trust that if the said Abram Minis shall depart this life leaving her the said Lavinia Florance surviving that the said Lavinia Florance shall have full power to dispose of the whole estate or any part of the same by a will duly made and executed by her."

A copy of said marriage settlement or deed of trust is attached to the petition as Exhibit B and is made a part of this finding by reference.

IV. Abram Minis and Lavinia Florance were married on October 22, 1851. Abram Minis died November 6, 1889. Jacob L. Florance was the father of Lavinia Florance.

V. At the time of the execution and delivery of said marriage settlement said Lavinia Florance possessed no property other than wearing apparel and a small amount of jewelry and personal effects, and no property of hers, other than such apparel, jewelry, and personal effects, then passed under the said marriage settlement.

The corpus of the trust estate, with very slight exception, never belonged to Lavinia F. Minis, but was the property of Jacob L. Florance, given by him during his life to the trustees under said marriage settlement for the purposes and upon the trusts therein stated.

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The properties given or conveyed to these trustees, the times thereof, the donors, and the values, are correctly stated in Paragraph VIII of the petition. At the time of the death of Lavinia F. Minis, lot 2 of Garden lot 9, Railroad Ward, Savannah, Georgia, and improvements was of the value of $2,500.00.

VI. In and by her will and codicils aforesaid the said Lavinia F. Minis executed the power of appointment expressly given to her in and by the aforesaid marriage settlement.

VII. On or about February 1, 1924, the plaintiffs prepared and filed with J. T. Rose, United States collector of internal revenue for the district of Georgia, a return for Federal estate-tax purposes under the provisions of the revenue act of 1921, in which return the plaintiffs showed the gross estate of the decedent, including the value of the property passing under the power of appointment, to be $1,277,306.83, the net estate to be $1,167,933.43, and the tax to be $68,293.34, which said tax was duly paid by the plaintiffs to the said collector of internal revenue on December 4, 1924. Exhibits C and D, attached to the petition in the cause, are copies of the material portions of this return, and are made a part of this finding by reference. Thereafter, upon review and reaudit of the aforesaid return, the Commissioner of Internal Revenue determined that the net estate of the decedent was $1,216,371.82, and that there was a deficiency in the tax paid by the plaintiffs of $1,390.68, which said sum, to wit, $1,390.68, the plaintiffs paid to the said collector of internal revenue on March 23, 1925, under protest, copy of which is attached to the petition as Exhibit E, and is made a part of this finding by reference.

VIII. In determining the deficiency as aforesaid the commissioner included in the decedent's gross estate the value of the property passing under the power of appointment exercised by the decedent as aforesaid and valued said property at $193,621.43, which value is correct.

IX. On March 23, 1925, the plaintiffs filed a claim for refund for $19,126.52, a copy of which, so far as material to

this action, is attached to the petition as Exhibit F and made a part of this finding by reference. The said claim for refund was amended on or about December 22, 1925, a copy of which amendment, so far as material to this action, is attached to the petition as Exhibit H and is made a part of this finding by reference. Said claim for refund as originally filed was rejected by the commissioner on August 20, 1925, and as amended was rejected on June 14, 1926. Copies of letters of rejection are attached to the petition, marked, respectively, "Exhibits G" and "I," and are made a part of this finding by reference.

X. If the value of the property passing under the power of appointment be excluded from the decedent's gross estate, the plaintiffs have overpaid the estate tax in the sum of $19,126.52.

The court decided that plaintiffs were not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

Lavinia Florance and Abram Minis before their marriage entered into a marriage settlement by the terms of which certain property then held by Lavinia Florance, or to be subsequently received by her from her father, was conveyed to one Isaac Minis in trust. It was provided in said settlement that Lavinia Florance should have full power to dispose of the whole estate or any part of same by will. She died October 12, 1923, leaving a will disposing of all her estate, including the property belonging to the marriage settlement trust. Her husband had previously died. The executors of the will of Lavinia Minis included the trust property in the estate-tax return and paid the tax thereon. Thereafter a claim for refund was filed for the recovery of that portion of the estate tax resulting from the inclusion of the marriage settlement trust property, which claim was denied. The tax involved here is controlled by the revenue act of 1921, 42 Stat. 278, the applicable provisions of which are as follows:

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time

of his death of all property, real or personal, tangible or intangible, wherever situated—

"(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after his death except in case of a bona fide sale for a fair consideration in money or money's worth; * * *."

The property covered by the marriage trust was valued in the tax return at $193,545.68, and the tax on same amounted to $19,126.52. This action is brought for the recovery of that amount.

It is the contention of plaintiff that the property involved was not a part of the estate of Lavinia Minis, and further, that the power of appointment contained in the marriage settlement was not a general power of appointment within the meaning of the statute.

The estate tax is an excise imposed upon the transfer of the net estate of the decedent. An examination of section 402 in its entirety would seem to indicate that it was the purpose of Congress to include in the *gross* estate any interest in property which might otherwise escape the payment of this tax on transfers, such as dower or curtesy; transfers made by the decedent in contemplation of, or intended to take effect, at or after death, and "(e) To the extent of any property passing under a general power of appointment exercised by the decedent, (1) by will, or (2) by deed executed in contemplation of, or intended to take effect at or after his death * * *." Obviously, the omission of the latter provision might easily result in the avoidance of the tax, to the extent of a practical nullification of the statute. It is not the property that is being taxed as a part of the net estate of the decedent. Congress has merely said that in measuring the tax on the transfer of the net estate property covered by a general power of appointment shall be included in the *gross* estate. In the case of *Fidelity Trust Co.* v. *McCaughn*, 1 Fed. (2d) 987, while the court correctly held that the power of appointment in that case was not a general power, the discussion of the question which we are now considering is interesting and illuminating. It is said in that

opinion: "The situation is not unusual in which a person may have two kinds of property. One is that which is emphatically his own, over which he has full dominion, because of his ownership; the other exists in the form of a power, which he has the right to exercise over property which does not otherwise belong to him, by which power, however, he may assert in practical effect as full dominion over the property as if it belonged to him outright." That is precisely the situation in regard to the property in the present case. Under the power of unrestricted disposition by will, the decedent had a full dominion over this property as if it had belonged to her outright. The opinion in the *Fidelity Trust case, supra*, contained the further declaration of principle, "Congress, it is true, can not change the law of property in the States. It is just as true, however, that no State can, by declaring the law of property to be different from what it is in other jurisdictions, force the hand of Congress in respect to how the tax shall be admeasured."

In *United States* v. *Field*, 255 U. S. 259, cited by both parties, there was involved the construction of section 202 of the revenue act of 1916, the predecessor of section 402 of the act of 1921, and of a Treasury regulation providing that, "Property passing under a general power of appointment is to be included as a portion of the gross estate of a decedent appointor." The court held that "the interest in question, not having been property of Mrs. Field at the time of her death, nor subject to distribution as part of her estate, was not taxable under clause (a)," but added the significant suggestion, "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent, had such a purpose existed, and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (section 402 (e), 40 Stat. 1097): 'To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by death.'" It is a logical inference that if

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paragraph (e) of section 402 had been in existence when the *Field case* was being considered, the court would have held that the property covered by the power of appointment should be included in the gross estate, although it was not the property of Mrs. Field at the time of her death. Plaintiffs' contention can not be sustained. The power contained in the marriage settlement, and exercised by the decedent, was a general power of appointment, and the property covered by said power was properly included in the gross estate of decedent. *Whitlock-Rose* v. *McCaughn*, 21 Fed. (2d) 164, is directly in point. The petition will be dismissed, and it is so adjudged.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

OSAGE TRIBE OF INDIANS v. THE UNITED STATES [1]

[No. B-38]

On the Proofs

Indian treaties; reformation; validity.—A treaty between the United States and Indian tribes is a part of the supreme law of the land, and can not be reformed by the courts or treated by them as inoperative. The power to make, modify, or abrogate is political and with Congress, which can not assign to the courts duties not properly judicial.

Same; special jurisdictional act of February 6, 1921; counterclaims; gratuities; claims against individuals.—Gratuities can not be recovered in the Court of Claims in the absence of an enabling act. The special jurisdictional act of February 6, 1921, did not contemplate the recovery of gratuities to the Osage Tribe of Indians where the conclusion of the court was against the tribal claim, nor did the act direct a consideration of counterclaims against the individuals of the tribe.

The Reporter's statement of the case:

Mr. Charles H. Merillat for the plaintiff. *Messrs. Charles J. Kappler* and *T. J. Leahy* were on the briefs.

[1] Appeal dismissed and certiorari denied.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Decided May 28, 1928. Motion for new trial overruled December 3, 1928.

The court made special findings of fact, as follows:

I. This suit is brought under the special jurisdictional act approved February 6, 1921 (41 Stat. 1097), which provides as follows:

"That the claim of the Osage Tribe of Indians against the United States for moneys due, arising out of the sale of Osage lands under the treaty of September 29, 1865, proclaimed January 21, 1867 (Fourteenth Statutes at Large, page 687), shall be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for the amount due or claimed to be due said tribe from the United States for the misappropriation of any of the funds of the said tribe, or for the failure of the United States to pay the tribe any money due under said treaty; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine, as right and justice may require, and as upon a full and fair arbitration, the claim of said tribe against the United States, notwithstanding lapse of time or statutes of limitation, and also any legal or equitable defense, set-off, or counterclaim, including gratuities, which the United States may have against said Osage Tribe, and to enter judgment thereon: *Provided*, That if it be found that the United States Government has wrongfully appropriated any part or parcel of the lands or the funds of said Osage Tribe of Indians, judgment for damages in respect thereto, if any, shall be confined to the value of the land, or the amount of funds, at the time of said appropriation, together with interest at the rate of 5 per centum per annum thereon to the date of the decree of the Court of Claims rendered in respect thereto, less any legal or equitable set-offs or counterclaims, including gratuities, which the United States Government may have against the said Osage Tribe of Indians. The judgment of the Court of Claims in this matter rendered, when satisfied, shall annul and cancel all claims and title of said Osage Tribe in and to said lands and funds, as well as all other matters and things adjudicated and authorized to be adjudicated by the Court of Claims, as herein provided. Such action in the Court of Claims shall be presented by a single petition, to

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be filed within two years after the passage of this act, making the United States party defendant, and shall set forth all the facts on which the Osage Tribe of Indians bases its claim for recovery; and the said petition may be verified by the authorized attorney or attorneys of the tribe, employed under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior, as provided by law, upon information or belief as to the existence of such facts, and no other statements or verifications shall be necessary. Official letters, papers, reports, and public records, or certified copies thereof, may be used as evidence. Whatever moneys may be found to be due the tribe under the provisions of this act, less attorney's fees, shall be segregated and placed to the credit of the individual Indians: *Provided* further, That the Court of Claims shall decree such fees as the court shall find to be reasonable to be paid to the attorney or attorneys employed by the tribe, and in no case shall such fees exceed the amount stipulated in the approved contract nor amount to more than 10 per centum of the amount and value of the judgment recorded in said cause."

II. The treaty of September 29, 1865, 14 Stat. 687, referred to in the act of February 6, 1921, between the Osage Indians and the United States, and out of which this claim arises, is as follows:

"ARTICLE I. The tribe of the Great and Little Osage Indians, having now more lands than are necessary for their occupation, and all payments from the Government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States the lands contained within the following boundaries, that is to say: Beginning at the southeast corner of their present reservation, and running thence north with the eastern boundary thereof fifty miles to the northeast corner; thence west with the northern line thirty miles; thence south fifty miles, to the southern boundary of said reservation; and thence east with said southern boundary to the place of beginning: *Provided*, That the western boundary of said land herein ceded shall not extend further westward than upon a line commencing at a point on the southern boundary of said Osage country one mile east of the place where the Verdigris river crosses the southern boundary of the State of Kansas. And, in consideration of the grant and sale to them of the above-described lands, the United States agree to pay the sum of

three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States, and interest thereon at the rate of five per centum per annum shall be paid to said tribes semiannually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands, but no preemption claim or homestead settlement shall be recognized: And after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States.

"ARTICLE II. The said tribe of Indians also hereby cede to the United States a tract of land twenty miles in width from north to south, off the north side of the remainder of their present reservation, and extending its entire length from east to west; which land is to be held in trust for said Indians, and to be surveyed and sold for their benefit under the direction of the commissioner of the general land office, at a price not less than one dollar and twenty-five cents per acre, as other lands are surveyed and sold under such rules and regulations as the Secretary of the Interior shall from time to time prescribe. The proceeds of such sales, as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians; and the interest thereon, at the rate of five per centum per annum, shall be expended annually for building houses, purchasing agricultural implements and stock animals, and for the employment of a physician and mechanics, and for providing such other necessary aid as will enable said Indians to commence agricultural pursuits under favorable circumstances: *Provided*, That twenty-five per centum of the net proceeds arising from the sale of said trust lands, until said percentage shall amount to the sum of eighty thousand dollars, shall be placed to the credit of the school fund of said Indians; and the interest thereon, at the rate of five per centum per annum, shall be expended semiannually for the

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boarding, clothing, and education of the children of said tribe.

"ARTICLE III. The Osage Indians, being sensible of the great benefits they have received from the Catholic mission, situate in that portion of their reservation herein granted and sold to the United States, do hereby stipulate that one section of said lands, to be selected by the commissioner of Indian affairs so as to include the improvements of said mission, shall be granted in fee simple to John Schoenmaker, in trust, for the use and benefit of the society sustaining said mission, with the privilege to said Schoenmaker, on the payment of one dollar and twenty-five cents per acre, of selecting and purchasing two sections of land adjoining the section above granted; the said selection to be held in trust for said society, and to be selected in legal subdivisions of surveys, and subject to the approval of the Secretary of the Interior.

"ARTICLE IV. All loyal persons, being heads of families and citizens of the United States, or members of any tribe at peace with the United States, having made settlements and improvements as provided by the preemption laws of the United States, and now residing on the lands provided to be sold by the United States, in trust for said tribe, as well as upon the said lands herein granted and sold to the United States, shall have the privilege, at any time within one year after the ratification of this treaty, of buying a quarter section each, at one dollar and twenty-five cents per acre; such quarter section to be selected according to the legal subdivision of surveys, and to include, as far as practicable, the improvements of the settler.

"ARTICLE V. The Osages being desirous of paying their just debts to James N. Coffey and A. B. Canville, for advances in provisions, clothing, and other necessaries of life, hereby agree that the superintendent of Indian affairs for the southern superintendency and the agent of the tribe shall examine all claims against said tribe, and submit the same to the tribe for approval or disapproval, and report the same to the Secretary of the Interior, with the proofs in each case, for his concurrence or rejection; and the Secretary may issue to the claimants scrip for the claims thus allowed, which shall be receivable as cash in payment for any of the lands sold in trust for said tribe: *Provided*, The aggregate amount thus allowed by the Secretary of the Interior shall not exceed five thousand dollars.

"ARTICLE VI. In consideration of the long and faithful services rendered by Charles Mograin, one of the principal chiefs of the Great Osages, to the people, and in consideration of improvements made and owned by him on the land

by this treaty sold to the United States, and in lieu of the provision made in article fourteen for the half-breed Indians, the heirs of the said Charles Mograin, dec[ease]d, may select one section of land, including his improvements, from the north half of said land, subject to the approval of the Secretary of the Interior, and upon his approval of such selection it shall be patented to the heirs of the said Mograin, dec[ease]d, in fee-simple.

"ARTICLE VII. It is agreed between the parties hereto that the sum of five hundred dollars shall be set apart each year from the moneys of said tribe and paid by the agent to the chiefs.

"ARTICLE VIII. The Osage Indians being anxious that a school should be established in their new home, at their request it is agreed and provided that John Schoenmaker may select one section of land within their diminished reservation, and upon the approval of such selection by the Secretary of the Interior, such section of land shall be set apart to the said Schoenmaker and his successors, upon condition that the same shall be used, improved, and occupied for the support and education of the children of said Indians during the occupancy of said reservation by said tribe: *Provided*, That said lands shall not be patented, and upon the discontinuance of said school shall revert to said tribe and to the United States as other Indian lands.

"ARTICLE IX. It is further agreed that, in consideration of the services of Darius Rogers to the Osage Indians, a patent shall be issued to him for one hundred and sixty acres of land, to include his mill and improvements, on paying one dollar and twenty-five cents per acre; and said Rogers shall also have the privilege of purchasing, at the rate of one dollar and twenty-five cents per acre, one quarter section of land adjoining the tract above mentioned, which shall be patented to him in like manner; said lands to be selected subject to the approval of the Secretary of the Interior.

"ARTICLE X. The Osages acknowledge their dependence on the Government of the United States, and invoke its protection and care; they desire peace, and promise to abstain from war, and commit no depredations on either citizens or Indians; and they further agree to use their best efforts to suppress the introduction and use of ardent spirits in their country.

"ARTICLE XI. It is agreed that all roads and highways laid out by the State or general government shall have right of way through the remaining lands of said Indians, on the same terms as are provided by law when made through lands of citizens of the United States; and railroad com-

panies, when the lines of their roads necessarily pass through the lands of said Indians, shall have right of way upon the payment of fair compensation therefor.

"ARTICLE XII. Within six months after the ratification of this treaty the Osage Indians shall remove from the lands sold and ceded in trust, and settle upon their diminished reservation.

"ARTICLE XIII. The Osage Indians having no annuities from which it is possible for them to pay any of the expenses of carrying this treaty into effect, it is agreed that the United States shall appropriate twenty thousand dollars, or so much thereof as may be necessary, for the purpose of defraying the expense of survey and sale of the lands hereby ceded in trust, which amount so expended shall be reimbursed to the Treasury of the United States from the proceeds of the first sales of said lands.

"ARTICLE XIV. The half-breeds of the Osage tribe of Indians, not to exceed twenty-five in number, who have improvements on the north half of the lands sold to the United States, shall have a patent issued to them, in fee-simple, for eighty acres each, to include, as far as practicable, their improvements, said half-breeds to be designated by the chiefs and headmen of the tribe; and the heirs of Joseph Swiss, a half-breed, and a former interpreter of said tribe, shall, in lieu of the above provision, receive a title, in fee-simple, to a half-section of land, including his house and improvements, if practicable, and also to a half-section of the trust land; all of said lands to be selected by the parties, subject to the approval of the Secretary of the Interior.

"ARTICLE XV. It is also agreed by the United States that said Osage Indians may unite with any tribe of Indians at peace with the United States, residing in said Indian territory, and thence afterwards receive an equitable proportion, according to their numbers, of all moneys, annuities, or property payable by the United States to said Indian tribe with which the agreement may be made; and in turn granting to said Indians, in proportion to their numbers, an equitable proportion of all moneys, annuities, and property payable by the United States to said Osages.

"ARTICLE XVI. It is also agreed by said contracting parties, that if said Indians should agree to remove from the State of Kansas, and settle on lands to be provided for them by the United States in the Indian territory on such terms as may be agreed on between the United States and the Indian tribes now residing in said territory or any of them, then the diminished reservation shall be disposed of by the United States in the same manner and for the same purposes

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as hereinbefore provided in relation to said trust lands, except that fifty per cent of the proceeds of the sale of said diminished reserve may be used by the United States in the purchase of lands for a suitable home for said Indians in said Indian territory.

"ARTICLE XVII. Should the Senate reject or amend any of the above articles, such rejection or amendment shall not affect the other provisions of this treaty, but the same shall go into effect when ratified by the Senate and approved by the President."

III. The chiefs signing the treaty were all full-blood blanket Indians, none of them understood or could read, write, or speak the English language, and all affixed their signatures by mark. The same is true of all the other Indians who affixed their signatures after those of the chiefs, and who were of lesser rank, with the exception of one brave at Fort Smith who understood and could speak English.

IV. The treaty negotiations were conducted at Fort Smith, Arkansas, with the Southern Osages, through an interpreter by the name of L. P. Chouteau, a half-breed Osage, and with the Northern Osage Indians at Canville trading post, Kansas, through an interpreter, one Alexander Beyett, also a half-breed Osage. The qualifications of these two men as interpreters of a treaty like the one here in dispute do not sufficiently appear. The time consumed at Fort Smith in council upon the provisions of the treaty can not be ascertained. At Canville trading post the treaty was negotiated and signed in three hours.

The record does not disclose any facts as to the negotiations preliminary to the signing of the treaty affecting the matter of price to be paid and of acreage and location of the property to be conveyed, nor who represented the Government in these preliminary matters, nor who represented the Indians.

V. At the time of making the treaty of 1865 the Osages were practically all full-blood blanket Indians, who could not read, write, or understand the English language, and had had little contact with the whites, and that principally as to the simple affairs of life, such as bartering skins for supplies. Some education of the younger generation

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was being undertaken in a mission school. There were very few mixed bloods among the Osages in 1865. The tribe was very poor. Its members lived mostly by the chase, and animals of the chase were rapidly disappearing. The affairs of the Osages were in the hands of the full-bloods, who held all positions of leadership, and it was with the full-bloods the treaty negotiations were conducted.

VI. The Osage language comprises a very few root words, but which with derivations make upward of a thousand words. It does not have a word equivalent to "civilization" or one equivalent to "fund," but these words can be explained in Osage so that "civilization fund" can be fairly understood. To describe "Indian tribes," meaning other tribes as well as the Osage, it is necessary to enumerate the specific tribes known to the Osages, or else to designate the Osages and use a word signifying "other than," or foreign, which in the Osage language are words of insult.

At the time the treaty was negotiated the Osages were hostile to certain other tribes, among whom were the Pawnees, Cheyennes, and Cherokees. They would not knowingly have agreed to the application of any of their funds to the benefit of such hostile tribes or of any tribe other than their own. They interpreted the words "Indian tribes," as they appear in Article I of the said treaty of September 29, 1865, to mean the tribe of the Great and Little Osage Indians to the exclusion of all other Indian tribes, and used the said words therein with that exclusive meaning.

VII. The "civilization fund," created by Article I of the said treaty, did not come into existence until the year 1873, at which time the first moneys came into the Treasury of the United States from the sale of Osage lands. There is no other instance where the United States has applied the proceeds of sale of lands of one tribe to the benefit of another.

VIII. The Osage Nation as a body had been loyal to the United States in the Civil War and had furnished 244 warriors to the Union armies. Shortly before the treaty of 1865 was made with said nation the treaty commissioners informed a large gathering of Indian tribes living in the

Southwest that the Civil War having closed, the United States intended to make new treaties with the Indian tribes generally. That as to those who had sided with the Confederacy it would be lenient, but would require certain conditions of them; but as to those who had been loyal the United States intended to recognize their loyalty in a signal manner in the new treaties. The United States recognized the Osage Nation as a body as loyal, though a few bands had left the body of the nation and joined the Confederacy.

IX. Receipts of moneys from the sale of lands to settlers under the treaty of 1865 were slow in coming into the Treasury. The Osages at this time were in want, and official reports made in the seventies by their agents show that they all, full bloods and half-breeds, believed the United States would give them the proceeds of the "civilization fund" or interest on it, and waited, looking forward to relief. There was great dissatisfaction among them when they learned in 1876 that the "civilization fund" was being used for the benefit of Indians other than Osages. They protested to their agent, Cyrus Beede, who wrote the Government as follows:

"Dissatisfaction exists among the Osages on account of a provision in their treaty with the Government, made in 1865, wherein it was provided that certain proceeds of the sale of a part of their reservation be applied to the civilization of Indian tribes throughout the United States without distinction. Upon careful inquiry I find no member of the tribe who claims to have understood the interpretation as given in the treaty; all claim to have accepted this provision to apply exclusively to beneficial purposes for the Osages, and my knowledge of the nature, character, and wants of Indians, especially the Osages, their extreme poverty at the time, and absolute need of all their available means for their own support, leads me to conclude that they were overreached; that they did not understandingly make this large contribution, aggregating many thousand dollars, to the support of other wards of the Government."

From that time on the Osages have steadfastly complained and protested against the interpretation given the treaty

and employed counsel to aid them. In a number of Congresses bills passed one House of Congress or were reported favorably by committees for their relief, but it was not until the present jurisdictional act that a measure was enacted into law. The jurisdictional act was passed after the claim had been fully investigated in committee, witnesses examined, and its nature and occasion fully made known.

X. The net amount realized from the sale of lands under Article I of the treaty of 1865 and turned into the "civilization fund" as therein provided was $776,931.58. Of this sum the only amount expended for the benefit of Osage Indians was the sum of $189.55 for seeds in 1880. The major portion, $776,493.25, was used for the benefit of Indians scattered throughout the United States and not of any one tribe. The balance remaining in the fund after such expenditures was $248.78, and this was covered into the surplus fund of the Treasury April 18, 1911, in compliance with the act of March 3, 1911, 36 Stat. 1062, and the account closed.

Counterclaims and set-offs

XI. 1. By article 5 of the treaty of November 10, 1808 (7 Stat. 107), the United States in consideration of the cession of lands therein made agreed to deliver annually to the Osage Nation at Fire Prairie or at St. Louis, merchandise to the value of $1,500. By article 7 of the treaty of June 2, 1825, proclaimed December 30, 1825 (7 Stat. 240), the Osage Nation released the United States from the obligation to deliver merchandise at Fire Prairie. The United States continued to pay to the Osage Nation yearly for thirteen years thereafter the annuity of $1,500, or a total of $19,500.00.

2. By article 8 of the treaty of June 2, 1825, the United States agreed to pay to the Delawares $1,000 in full satisfaction of all their claims and demands against the Osages. The amount paid by the United States under this article of the treaty was $1,150.00, an excess of $150.00.

3. By article 4 of the treaty of November 10, 1808, article 2 of the treaty of September 25, 1818 (7 Stat. 183), and article 9 of the treaty of June 2, 1825, the United States

agreed to pay for property stolen or destroyed by the Osages, provided the sums to be paid by the United States thereunder did not exceed, respectively, the sums of $5,000, $4,000, and $5,000. Under these treaty stipulations the United States actually paid a total of $15,963.42, an excess over the amounts stipulated of $1,963.42.

4. By article 3 of the treaty of June 2, 1825, it was provided that whenever the annuity therein stipulated "or any part thereof, shall be paid in merchandise, the same is to be delivered to them at the first cost of the goods at St. Louis, free of transportation." During the period that this treaty was in effect, to wit, from January 1, 1826, to December 31, 1839, the United States expended in charges for "express and transportation" of annuity goods the sum of $14,398.22. The excess cost of transporting these goods, or any part of them, through to the Osage Nation, over the cost of delivering them at St. Louis, is not proved.

5. By article 2d of the treaty of January 11, 1839 (7 Stat. 576), the United States agreed to pay the Osages an annuity of $20,000 for 20 years, $12,000 in money and $8,000 in goods, stocks, provisions, or money, as the President might direct, a total obligation of $400,000. The United States actually paid the Osages as in fulfillment of this obligation $238,-935.63 in cash and $198,665.84 in goods, a total of $437,601.47. It does not appear that the United States was not otherwise obligated, by treaty or other agreement, to pay the excess of $37,601.47.

6. From April 28, 1810, to June 30, 1922, the United States, although under no treaty obligations so to do, expended the following amounts for the purposes indicated. That the Osage Tribe of Indians received benefit from these expenditures and to what extent, does not satisfactorily appear:

Presents	$16,002.67
Provisions	20,316.55
Medical and hospital supplies, medical attention, vaccination	1,596.59
Burial of Indians	115.00
Delegations to Washington or elsewhere	6,626.93
Pay of Indian agents and subagents	55,312.10
Pay of interpreters	28,325.13

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Pay of miscellaneous agency employees	$3, 517. 54
Agency building and repairs	11, 191. 44
Miscellaneous agency expenses	11, 702. 18
Education	48. 845. 73
Pay of Indian police	18, 682. 64
Pay of farmers	4, 286. 32
Agricultural aid	1, 913. 71
Livestock	1, 849. 20
Feed for livestock	114. 58
Fuel	40. 00
Advertising, insurance, and transportation	42, 692. 64
Losses reimbursed under act of March 3, 1877 (19 Stat. 292), and act of March 3, 1885 (23 Stat. 464)	5, 000. 00
Total	278, 130. 95

7. On July 1, 1874, by order of the President, the Kansas or Kaw Indians were attached to the Osage Agency. On July 1, 1904, they were placed under a separate agency. During this period certain expenditures were made by the United States, the benefit of which, if any inured to them, inured to the Osages and Kaws jointly. The accounts and claims settlements of these joint expenditures fail to show the amounts chargeable to the Osages.

8. During the period from November 1, 1879, to September 1, 1918, the United States supported, maintained, and operated a nonreservation Indian school at Carlisle, Pennsylvania. During the period of the school's existence the United States supported and educated Osage Indian children therein at a cost to it of $76,139.45.

9. The United States supports, maintains, and operates nonreservation Indian schools at Chilocco, Oklahoma, at Genoa, Nebraska, and at Lawrence, Kansas. Up to and including June 30, 1925, the United States has educated and supported Osage Indian children therein at a total cost to it of $122,312.89.

The court decided that plaintiff was not entitled to recover. Counterclaims dismissed.

GRAHAM, *Judge*, delivered the opinion of court:

This suit rests upon a special act of Congress dated February 6, 1921, 41 Stat. 1097, submitting to this court the claim

of the Osage Tribe of Indians against the United States for moneys due and arising out of the sale of Osage land under the treaty of September 29, 1865, proclaimed January 21, 1867, 14 Stat. 687, for the amount due or claimed to be due the said tribe from the United States for the misappropriation of any funds of said tribe, or the failure of the United States to pay the tribe any money due under said treaty, with jurisdiction to hear and determine said claim as therein provided, notwithstanding the lapse of time or the statute of limitations, and also any legal or equitable defense or set-off or counterclaim which the United States may have against said tribe.

At the time of the negotiation of the said treaty of September 29, 1865, there were two parts of the Osage Tribe of Indians, known commonly as the Southern Osages and the Northern Osages. Apparently the former were located in the State of Arkansas and the latter in the State of Kansas. They were with few exceptions full-blooded blanket Indians, having but little intercourse with the whites, except as they came in touch with them in the sale of their products of the chase, skins of animals, etc.

At the time of the making of the treaty practically none of these full-blooded blanket Indians could read, write, or understand the English language. The tribe was very poor and in very needy circumstances. Its members lived mostly by the chase, and the animals of the chase were rapidly disappearing. The affairs of the tribe were entirely in the hands of the full-bloods, who occupied all the positions of leadership. In the Civil War they had been loyal to the Union and had furnished about 240 men from the ranks.

What preliminary negotiations took place leading up to the execution of said treaty do not appear—that is to say, how the purchase price and the acreage and location of the land were agreed upon, and with whom. A treaty prepared in advance by the representatives of the United States was presented for consideration, first at a meeting of the Southern Osages at Fort Smith, Arkansas, and afterwards to the Northern Osages at Canville trading post in Kansas. The interpreters for the Indians on both occasions were two half-

breed Osages, one interpreting at one place and one at the other. It does not appear what qualifications these two men had as interpreters. The time consumed in explaining and executing the treaty at Fort Smith does not appear. The time consumed at Canville trading post in negotiating and signing was three hours.

All of the signers of the treaty at both places were full-blood Indians, who did not understand English, could not write their names, and signed with a mark, with the exception of George or Little Beaver, who may have understood English. While certain of these Indians appear on the treaty as having signed at Fort Smith, it would seem from the acknowledgment of their signatures that they did not sign at the time of the said meeting at Forth Smith for the approval of the treaty.

The vocabulary, if such we may call it, of the Osages was very limited, and it is a question whether it was possible for an interpreter to explain to these blanket Indians so that they would understand this treaty of seventeen articles, covering seven or eight printed pages, at least in three hours.

The Osage language comprises very few root words, which with derivatives made upwards of a thousand words in the language at that time. It has no word which is the equivalent of "civilization" or one which is the equivalent of "fund," but it was possible to explain "civilization fund" so that it could be fairly understood. To describe Indian tribes, meaning other tribes as well as the Osages, it was necessary to enumerate specific tribes known as the Osages, or designate the Osages, and use the words signifying "other than" or "foreign," which in the Osage language are words of insult.

At the time the treaty was negotiated the Osages were hostile to certain other tribes, among them the Pawnees, Cheyennes, and the Cherokees, and would not knowingly have agreed to part with any of their funds for the benefit of such hostile tribes. It is fair to assume that they interpreted the words "Indian tribes" to mean the tribe of the Great and Little Osage Indians to the exclusion of other tribes. The civilization fund which was created by the

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treaty did not come into existence until 1873, at which time the first moneys came into the Treasury. There is no other instance in connection with treaties by the United States with the Indians where the United States has applied or undertaken to apply the proceeds of sales of lands of one tribe to the benefit of another.

When these Indians learned in 1876 that the civilization fund was being used for the benefit of Indians other than the Osages, they protested to their agent, Cyrus Beede, who wrote at that time to the Government voicing this protest and dissatisfaction, and from that time on the Osages steadfastly complained against the interpretation given the treaty, and have employed counsel to aid them.

The treaty contains the following language, which embraces the bone of contention here:

"ART. I. * * * said lands shall be surveyed and sold * * * for cash * * *; and after reimbursing the United States the cost of said survey and sale and the said sum of $300,000 placed to the credit of said Indians, the remaining proceeds shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

The treaty granted, sold, and conveyed to the United States a tract of land 30 by 50 miles in extent, and the consideration for said grant and sale was the payment of $300,000, the amount to be placed to the credit of the tribe in the United States Treasury, and interest to be allowed thereon at 5%, to be paid to the Indians semiannually. It then provided that after the sale of the land by the Government, any surplus remaining after the payment of the $300,000 and the cost of survey and sale, should be placed in the Treasury of the United States as stated above, as a "civilization fund" for the "education and civilization" of Indian tribes residing within the limits of the United States.

There is nothing to show what preliminary negotiations, if any, took place at which the terms of this treaty were agreed upon. It was brought already prepared to the meetings of the Indians at Fort Smith, Ark., and Canville trading

post, Kansas, where the two branches of the Osages, respectively, lived. However this may be, the treaty was a sale and conveyance of the land for the sum of $300,000, and the land thereby became the property of the United States Government. By its terms it was obligated only to pay to the Indians the sum of $300,000, and there is no dispute about the fact that it did this. Any surplus proceeds which might arise from the sale would therefore, under the treaty, become the property of the United States Government, and had it not gratuitously devoted this surplus to a "civilization fund" for the civilization and education of Indian tribes, there could have been no question raised such as is raised here.

But the language of the treaty is unambiguous. Its meaning is clear without the aid of extraneous facts. The fund here was to be devoted "to the education and civilization of Indian tribes residing within the limits of the United States." In order to make this language apply exclusively to the Osage Indians, the whole meaning of it would have to be changed by the inclusion of additional words. It is not the province of this court to reform treaties or to make new treaties for the parties. That is the function and province of the political department of the Government. *Creek Nation* v. *United States*, 63 C. Cls. 270, 272, 273; *United States* v. *Choctaw, etc., Nations*, 179 U. S. 494, 535.

While the language of the act "to hear and determine, as right and justice may require, and as upon a full and fair arbitration, the claim of said tribe against the United States," etc., has a wide scope, we are of opinion that it does not authorize this court to go beyond the limits which the courts have set in cases where a court has had to deal with treaties.

In the case of the *Sisseton & Wahpeton Indians* v. *United States*, 58 C. Cls. 302, 329, where a certiorari to this court was recently denied by the Supreme Court, the question involved was mutual mistake as to the amount of land covered by the cession, and it was contended that the court had authority under the facts and the jurisdictional act to re-

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form the treaty, this court said, quoting from the *Old Settlers case*, 148 U. S. 427, 468:

"Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its action or the action of the Government to judicial decisions by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference."

This court has no jurisdiction to inquire into the inequity or impropriety of treaties between the Indians and the United States. *Otoe & Missouria Indians* v. *United States*, 52 C. Cls. 424, 429. The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but simply provides a forum for the adjudication of the claim according to applicable legal principles, and does not provide for a recovery upon a merely moral obligation. Its construction must and can only rest upon a construction of the pertinent statutes and treaties giving effect to their plain import. *Mille Lac case*, 229 U. S. 498, 500.

The treaty before this court, and even on appeal to the United States Supreme Court, would still remain and must remain a part of the supreme law of the land, and no court, either of law or equity, in this country can declare that it was procured by fraud or duress or mistake and treat it as inoperative. *Old Settlers case*, 27 C. Cls. 1, 36.

In the *Muskrat case*, 219 U. S. 346, 352, the Supreme Court said:

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner."

The judicial duties of this court do not extend to reforming, amending, or making over a treaty, and where, as in this case, its language is unambiguous, however much the facts may appeal to the ethical sense of the court, it has no option but to enforce the treaty as it finds it. It is therefore of

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the opinion that the claim asserted here by the plaintiff can not be sustained, and that the defendant is not liable to the plaintiff in any amount under the treaty.

We conclude that the Osage Tribe of Indians, under the language and meaning of said treaty, have not established a claim or right in the fund or moneys arising from the sale of the Osage lands under said treaty, and that the United States has not wrongfully appropriated any part or parcel of the lands or the funds of said Osage Tribe of Indians under said treaty.

We are of the opinion that the act did not contemplate that the court should consider or make allowance for counterclaims where the conclusion of the court was against the claim of the Osage Tribe of Indians, and therefore, as the conclusion is against the claim, no further consideration should be given to the counterclaims. It may, however, be well to state that as to the counterclaims the special act directed consideration only to counterclaims against the Osage Tribe and not against individuals of the tribe. In this view of the matter, counterclaims Nos. 8 and 9, being for expenditures for education of individual Indians at schools, are not within the meaning of the special act, and could not be considered in any event as an offset against the Osage Indians as a tribe.

As to counterclaims Nos. 4, 5, 6, and 7, the findings show that they are not satisfactorily established and would in any event be rejected. The other three counterclaims, some of which are over a century old, in the light of the character of the expenditures and the conduct of the Government, should be treated as gratuities, and apparently were so regarded by the Government. Gratuities can not be recovered in this court, and could only be considered here in connection with the special provisions of the enabling act as set-offs in case of an allowance of plaintiff's claim.

Judgment should be entered in favor of the defendant and against the plaintiff, and it is so ordered.

The counterclaims are disallowed and dismissed.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice,* concur.

FORMER CORPORATION v. THE UNITED STATES [1]

[No. D-244]

On the Proofs

Jurisdiction; loss of post-office money orders; proof.—Under the acts creating and regulating the post-office money-order system payment for lost money orders is with the Postmaster General, upon proof satisfactory to him, and where there has not been such proof suit can not be maintained in the Court of Claims. Whether the Court of Claims has jurisdiction in a case where the proof is satisfactory to the Postmaster General, not decided.

The Reporter's statement of the case:

Mr. Clarence N. Goodwin for the plaintiff.

Mr. John E. Hoover, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Decided May 28, 1928. Motion for new trial overruled December 3, 1928.

The court made special findings of fact, as follows:

I. Philipsborn's was at the time of the events hereinafter mentioned a corporation engaged in the mail-order business, with its principal place of business located in Chicago, Ill.

In the year 1922 it sold and transferred its business to Philipsborn's, a Delaware corporation, at the same time changing the name to the Former Corporation, plaintiff in the above-entitled cause. Shortly thereafter the Former Corporation went into the hands of a receiver and has not since conducted any business.

II. On December 11, 1919, it had on hand 4,326 United States post-office money orders aggregating $29,396.37, which it had received from customers for the purchase of goods. The amount of each of these money orders was separately listed on a deposit slip for banking purposes, but no record was kept showing the post office issuing each order, the serial number of the order, the date on which such order had been issued, or the name of the remitter, or of any of these facts.

[1] Certiorari denied.

After making up this deposit slip each of the orders was placed in an endorsing machine and stamped with an endorsement to the National Bank of the Republic in Chicago, Ill.

III. Together with currency and checks, these money orders were on said date given to a messenger in the employ of the company for purposes of deposit in the aforesaid bank. On the way to the bank the messenger was robbed, the robbers taking with them, among other things, all of the said money orders.

Immediately upon being advised of the robbery the company took all necessary and appropriate steps for the apprehension of the robbers and the return of the money orders, all of which efforts were unsuccessful.

IV. Immediately upon receipt of the news of the robbery the company stopped shipment of all goods then ready for transit until the names and addresses of the consignees could be taken and thereafter wrote to these consignees for information which would identify the time and place when and where these money orders were issued.

In response to information gained through the medium of such correspondence the company was able to identify 908 of the lost money orders. Duplicates of these 908 orders were thereupon issued by the Postmaster General. These duplicates so issued aggregated $7,179.90.

Through the correspondence thus conducted with its customers the company received information from 2,126 of them which it submitted to the Chicago post office. The number of money orders which could not be identified by this information was 1,218, and issuance of duplicate orders thereon was refused by the Postmaster General because of unsatisfactory or insufficient proof.

While the Postmaster General issued duplicates for 908 of the orders, it does not appear upon what proof, nor as to the 2,126 on which duplicates were requested does it appear what proof was submitted or that the certificates of nonpayment from the issuing postmaster and the postmaster by whom payable, required by statute, were submitted. As to the balance of money orders, other than the said 2,126,

it does not appear that any proof was at any time submitted to the post-office authorities other than the several amounts thereof, the possession of the orders, and their loss.

There is no direct proof that any of these orders were unpaid, and only presumptive proof with respect to the 908 as to which the Postmaster General issued duplicates. There is no proof identifying any of these orders—that is to say, of the post office where issued, the post office where payable, the serial number and date of order, and names of remitter and payee. The only proof is as to the amount of each order and possession.

V. Under date of October 18, 1921, the company filed its claim with the Post Office Department for the issue of warrants covering the value of the lost money orders not duplicated. After numerous conferences and correspondence the claim was on December 4, 1923, denied.

VI. The company's loss was covered by a policy of insurance issued by the Massachusetts Bonding and Insurance Company, which company after an investigation of the facts paid to Philipsborn's on June 3, 1920, the sum of $22,216.47, and thereupon Philipsborn's and the insurance company entered into an agreement whereby Philipsborn's released the insurance company from any further claims under the contract of insurance and also agreed to a subrogation of its rights, the terms of which were as follows:

"* * * Third. First party further agrees, in consideration of its having this day been paid the said sum of twenty-five thousand dollars ($25,000), that after it shall have collected and received from the proceeds of said salvage the sum of eight thousand dollars ($8,000) (thereby realizing as a result of its loss twenty-five thousand dollars ($25,000) from second party and eight thousand dollars ($8,000) from such salvage), making a total sum of thirty-three thousand dollars ($33,000), said second party shall at once be subrogated to the rights of first party as respects any amount that can or may in anywise be realized out of said salvage or claims that first party shall or will or might have made upon said drafts, money orders, bank checks, or as a result of its loss as above stated; and said first party does hereby sell, assign, transfer, convey, and set over unto said second party all the property and assets so lost by it as aforesaid or that

constitute such salvage (save such portion thereof as will enable said second party to receive said eight thousand dollars ($8,000) as aforesaid); and the receipt of said sum of twenty-five thousand dollars ($25,000) in manner aforesaid, by first party from second party, as well as the receipt by first party from said salvage of said sum of eight thousand dollars ($8,000), shall operate to convey such salvage and to assign its said claim and demand to party of the second part. The term "salvage" shall include postal money orders, checks, drafts, currency, and other property embraced with the claim and demand heretofore filed by first party against second party, and any and all property lost by virtue of its messenger having been held up in manner aforesaid, as well as any money or property that shall be realized from the property so lost.

"Fourth. First party in further consideration of the premises, does hereby give and grant unto said second party the right to take such steps as second party may deem best to realize from said salvage a reimbursement, in so far as it is possible for it so to do, of the sum of twenty-five thousand dollars ($25,000) this day paid by second party to first party as aforesaid, together with such other sums as it may have expended in connection with said investigation as aforesaid and otherwise in said matter; and first party hereby expressly agrees that its books, records, and accounts, and all documents and papers that it now has or may have procured in connection with said claims and demands aforesaid shall at all times be open to second party for such use, examination, and inspection as may be necessary, and said second party shall have and is hereby expressly given the right to proceed in court or otherwise, either in the name of the first party or otherwise, or in such other manner as it may find requisite and necessary, in order to realize from said salvage and be reimbursed as aforesaid; but it is agreed that all expenses in connection with its own investigation or procedure shall be borne by second party."

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

Philipsborn's, the predecessor of the plaintiff, was engaged in the mail-order business, and on December 11, 1919, had on hand 4,326 money orders, the face value of which aggregated $29,396.37. These orders were given to a messenger, with a typewritten deposit slip containing only the amount

of each order, to deposit in bank. A copy of the deposit slip was retained, and each of the orders was stamped with the name of the bank where they were deposited. The messenger was robbed on his way to the bank, and the orders were never recovered, nor does it appear what became of them.

It was necessary under the provisions of the law for Philipsborn's to produce proof to the Postmaster General before duplicate orders could be issued. The provisions of the statute are quoted further on. The law allowed a year from the last day of the month of issue within which the Postmaster General might issue duplicates upon satisfactory proof and identification of the lost orders.

It appears that Philipsborn's presented to the Postmaster General certain facts as proof on 2,126 of these orders. Of these, the Postmaster General apparently held that only 908 were established by satisfactory evidence as having been issued and not paid, and for this number issued duplicate orders in March, 1920. It does not appear that as to the balance of the 4,326 orders there was any proof submitted other than the amount of each order and possession.

After the expiration of the one-year period fixed by the statute within which duplicate orders could be issued, plaintiff, on October 18, 1921, filed a claim with the Post Office Department covering the balance of the lost orders other than the 908, and after numerous conferences and correspondence the claim was, on December 4, 1923, denied. The plaintiff is suing for the face value of the said balance of the orders.

There is a suggestion in the plaintiff's brief of a recovery on the ground of a promise implied in law that is to say, that the Government has the plaintiff's money without right and there is a promise implied to return it. This goes upon the assumption that the plaintiff has identified these money orders, and that none of them has been presented or paid, which is the very matter in dispute.

So that a recovery here is upon an express contract growing out of the issuance of the money orders and the receipt of the money by the Government. The money-order system is a creature of a statute, and all parts of the statute neces-

sarily become a part of the contract between the Government and the receiver of the order as well as the payee. The establishment of the system was, of course, a voluntary act of the Government for the convenience of the public, and, as it had a right to do, it made such provisions as it saw fit as to the issuance and payment of the orders and in other particulars, and especially with regard to payment of lost orders. It provided what proof was necessary before the Postmaster General had authority to issue a duplicate and the time within which it could be done, and it provided the conditions upon which, after the expiration of this time, a warrant for payment could be issued, the proof required, and the tribunal which was to decide when that proof was satisfactory. That tribunal was the Postmaster General. The applicable statutes [1] in this regard will be found in the footnote.

The act of January 27, 1894, quoted below, provides that warrants may be issued on the certificate of the Auditor of the Treasury for the Post Office Department, or upon other proof satisfactory to the Postmaster General, that the order has not been paid. It does not appear that such proof was presented to the Postmaster General. If a certificate had been produced and the Postmaster General had refused to issue the warrant, the plaintiff's relief would have been

[1] Sec. 11, act of January 27, 1894, 28 Stat. 30, 33:

"Whenever a money order has been lost within one year from the last day of the month of issue the Postmaster General, upon the application of the remitter or payee of such order, may cause a duplicate thereof to be issued, without charge, providing the person losing the original shall furnish a certificate from the postmaster by whom it was payable that it has not been, and will not thereafter be, paid; and a similar certificate from the postmaster by whom it was issued that it has not been, and will not thereafter be, repaid.

"Whenever a money order which has not been paid within one year from the last day of the month of issue, has been lost, the Postmaster General, upon the application of the remitter or payee of such order, shall issue a warrant for the payment thereof, as provided for in section four of this act, without charge, on the certificate of the Auditor of the Treasury for the Post Office Department, or upon such other proof satisfactory to the Postmaster General, that the order has not been paid."

Act of May 27, 1908, 35 Stat. 406, 416:

"That the Postmaster General, upon evidence satisfactory to him, and under such special regulations as he shall prescribe, may cause payment to be made in the manner prescribed in sections four and eleven of the act approved January twenty-seventh, eighteen hundred and ninety-four, of the amount of any domestic money order remaining unpaid after the lapse of three years from the date of its issue. And it shall hereafter be the duty of the Auditor for the Post Office Department to maintain a complete and permanent record of all unpaid money orders issued by postmasters in the United States, or such of its insular possessions as are amenable to the authority of the Postmaster General for payment within its own territory, such record to serve as a basis for adjudicating claims for payment by warrant of the amounts of said orders."

in another court to compel his performance of the act. If the refusal was due to what the Postmaster General considered unsatisfactory proof, this court would have no jurisdiction because a disputed question of fact would be involved, the decision of which has been placed by the statute in the discretion and judgment of the Postmaster General. *Shook* v. *United States*, 61 C. Cls. 816, 820; *United States* v. *Babcock*, 250 U. S. 328, 331. And this last is also true with regard to the provisions of the act of May 27, 1908, also quoted in the footnote, which uses the language:

"That the Postmaster General, upon evidence satisfactory to him, and under such special regulations as he shall prescribe, may cause payment to be made."

The act provides in the case of lost orders a right and a remedy. See *Shook* and *Babcock cases*, *supra; Wilder Manufacturing Co.* v. *Corn Products Co.*, 236 U. S. 165, 174, 175, and cases there cited. The United States can not be sued without its consent expressly given. No consent has been given by this act. The act contains no language giving jurisdiction to this court to consider such a claim as this or review the decision of the Postmaster General. The case must rest within the four corners of the acts creating and regulating the post-office money-order system, and the issuance and payment of warrants for lost money orders are placed within the judgment of the Postmaster General or under rules and regulations issued by him. Payment for a lost money order can only be secured by proof satisfactory to him. Whether in a case where the proof was admittedly satisfactory this court would have jurisdiction, it is unnecessary to decide.

No satisfactory proof appears in the findings identifying these orders or demonstrating that they have not been paid. When the plaintiff gave the orders to the messenger for deposit it retained only a copy of the deposit slip, and it does not appear that it kept any record of the number of the order, the name of the remitter or of the post office from which it was issued, or its date. Had it done so there would have been little difficulty in adjusting the matter with the Postmaster General, as the said act of January 27, 1894,

provides that the Postmaster General may issue a duplicate provided he is furnished a certificate from the postmaster by whom the order was issued that it had not been and would not be paid thereafter, and a similar certificate from the postmaster by whom it was payable that it had not been and would not be paid thereafter. There is no proof showing by what office the orders were issued or at what office payable, who the remitters were, the dates or numbers of the orders, or any certificates as to nonpayment from either the issuing or the paying office. So that, even if we did not hold, as we do, that this court is without jurisdiction, there could be no recovery under the facts.

The facts found show that the plaintiff at the time of the theft of the orders, December 11, 1919, was a corporation, under the laws of what State does not appear; that, after assigning the claim to the insurance company it in 1922 sold and transferred its business to Philipsborn's, a Delaware corporation, at the same time changing its name to the Former Corporation, plaintiff in this cause; that thereafter the said Former Corporation went into the hands of a receiver and has not since conducted business.

Judgment should be entered in favor of the defendant and the petition dismissed, and it is so ordered.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

ARUNDEL SAND & GRAVEL CO. v. THE UNITED STATES

[No. E-207]

On the Proofs

Contract to deliver sand f. o. b. barge at wharf; change in place of delivery.—Where a contract with the Government provided for delivery of sand f. o. b. barge at wharf, and at the direction of the Government the contractor delivered the sand on barge at an adjacent cofferdam, delivery was in compliance with contract.

Reporter's Statement of the Case

Same; loss of barge; liability of consignee.—Where in a contract with the Government to deliver sand f. o. b. barge at a private wharf the contractor, under protest that it was not a safe place to moor a barge, nevertheless at the direction of the Government tied one in bad condition at a near-by cofferdam, which was a reasonably safe place in ordinary weather, and there left it to be unloaded, the Government could not be held for anything but reasonable care, which, under the circumstances, it exercised and was not liable for loss due to a sudden and unusual storm.

The Reporter's statement of the case:

Mr. H. L. Underwood for the plaintiff. *Quigley & Hammers* were on the briefs.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Decided May 28, 1928. Motion for new trial overruled December 3, 1928.

The court made special findings of fact, as follows:

I. The plaintiff herein, the Arundel Sand & Gravel Co., is a Delaware corporation, has its principal office at Baltimore, Maryland, and is in the business of dredging, screening, washing, and selling sand and gravel, and was so engaged during the years 1917, 1918, and 1919.

II. On March 20, 1919, the plaintiff entered into a contract with the Navy Department to furnish and deliver at the contractor's risk and expense, in barge-load lots, f. o. b. barge at wharf, Newport News, Virginia, within ten days from receipt of order from the supply officer, 60,000 tons (more or less) of sand at $1.00 per net ton, at the rate of 2,000 tons of sand per day. The contractor agreed therein to allow 24 consecutive hours' free time, demurrage to be charged at the rate of $15.00 per day or fraction of day for all time in excess of the above, Sundays and holidays included.

A copy of this contract is attached to and made a part of these findings as "Appendix A."

III. The sand was being used by the James Stewart Company, subcontractor for the Newport News Shipbuilding &

Dry Dock Co., prime contractors with the Government in the construction of shipways 8 and 9, Newport News, Virginia.

IV. Prior to March 1, 1919, the plaintiff had been making deliveries of sand to said shipways 8 and 9 pursuant to direct orders from the Navy Department, placed with plaintiff under the authority of the naval appropriation act of March 4, 1917, and the urgent deficiency act of June 15, 1917, and the Executive order of the President issued thereunder August 21, 1917.

On February 19, 1919, the supply department of the Norfolk Navy Yard wrote plaintiff as follows:

"1. The supply officer is in receipt of communication from the James Stewart Company, at Newport News, Va., complaining of the fact that your sand scows are being tied alongside their cofferdam at shipways 8 and 9, and that in heavy winds and rough weather these boats cause serious damage to the cofferdam.

"2. It is requested that you instruct the captain of your tugboats that delivers these scows to the James Stewart Company, at shipways 8 and 9, to place same alongside the dock instead of the cofferdam.

"3. Your immediate attention is desired."

Plaintiff replied to this letter on February 20, 1919, as follows:

"Replying to your favor of the 19th file 21106–S4. We will be governed accordingly, but if any damage is done by reason thereof will hold you responsible for same as this is not a safe place to tie up scow."

After these communications plaintiff was precluded from mooring on the west side of the cofferdam, but was permitted to tie its scows to the north side of the cofferdam where the concrete work gave safety to the cofferdam. About noon on March 26, 1919, two scows of sand, *Nos. 117* and *118*, arrived at shipways 8 and 9 for delivery by plaintiff upon the contract, and a representative of the defendant on the ground directed the representative of the plaintiff in charge of the scows to tie them up to the north side of the cofferdam, near the northwest corner thereof, which was done. The defendant's wharf was not a commercial wharf.

Reporter's Statement of the Case

V. On the following morning scow *No. 118* was moved inshore by the defendant to the dock, which was adjacent to and continuous with the north side of the cofferdam, for unloading, while scow *No. 117* remained where it was tied at the cofferdam until it was lost, about 1 o'clock in the morning of March 28th, as hereinafter described.

VI. Scow *No. 117* was about three years old, was not in good repair, and some of the deck planks were missing. Its condition was such as to make it unseaworthy in rough weather. It was of the deck-lighter type, that is to say, the load was placed upon the deck and not in the hold. On account of the condition of the deck, waves breaking over it would tend to fill the hold with water.

VII. It had been the practice of plaintiff, prior to February 20, 1919, to moor its scows at a more protected point alongside the cofferdam. The defendant claimed that this practice resulted in injury to the cofferdam from the beating of the scows against it. Plaintiff made it a practice thereafter, and had for some time previous to the loss, to tie its scows at the point where scow *No. 117* was tied, and they were left there sometimes a week or more before unloading. The plaintiff protested against the change on the ground that the new location was exposed to high winds, but proceeded to tie them wherever defendant's representative directed.

After scow *No. 117* had been tied up as directed it passed under the control of the defendant, and the plaintiff did and could do nothing more to complete the delivery of the said sand. It was the custom of defendant to unload the scows at the dock, for which purpose a line was put out on them and they were pulled alongside the dock by man power or by crane. Plaintiff had nothing to do with this operation.

The place where scow *No. 117* was moored was a reasonably safe place in ordinary weather.

VIII. During the night of March 27th an unusual storm suddenly blew up from the northwest with high winds and waves, which caused or largely contributed to cause the loss of said scow *No. 117*. The rope to which it was tied broke during the storm and the scow disappeared about 1 a. m. on

the 28th. Efforts were made to locate it by diving, dragging, and sending a launch into neighboring rivers and creeks, but it was not found.

IX. At the time of its loss the fair market value of scow *No. 117* was $10,000.

X. When delivered on March 26, 1919, scow *No. 117* had upon it a load of sand weighing approximately 267.8 net tons, the contract price of which was $267.80.

XI. Claim in the amount of $10,267.80 was presented by plaintiff to the Navy Department and was by the Secretary of the Navy rejected August 23, 1920, on the ground that the same was for unliquidated damages and as such within the jurisdiction of the accounting officers only. Upon its presentation to the General Accounting Office the claim was disallowed February 13, 1922, and the disallowance adhered to by the Comptroller General on review October 4, 1922.

The court decided that plaintiff was entitled to recover, in part.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a suit to recover the value of a barge and a load of sand thereon lost in a storm at sea. The facts are fully set out in the findings and it is unnecessary to rehearse them.

The barge with its load of sand was moored by a rope to a cofferdam near the dock of the defendant, and owing to a sudden storm of wind, accompanied by heavy waves, the barge first began to sink and then, owing to the breaking of the rope by which it was attached to the cofferdam, it sank or apparently drifted away, as it was not afterwards located, though search was made.

The court has found that the place at which it was moored was a reasonably safe place for that purpose. The plaintiff towed the barge by tug and was prepared to deliver it at the wharf, but, under orders of the representative of the defendant, moored it to the cofferdam near the wharf and left it. This was the custom, the defendant afterwards

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moving the barges down to the wharf and unloading them as suited its convenience. The barge had been moored about 36 hours before its loss.

The contract of the plaintiff called for the delivery of sand f. o. b. barge at the wharf of the defendant. It brought the sand in a barge prepared to deliver it at the wharf, and under orders of defendant moored it at the cofferdam near by and thus delivered the sand. This mooring was for the convenience of the defendant. The plaintiff had done all that it could or was called upon to do under its contract to make delivery. The defendant had possession of the sand. It must, therefore, be held that the plaintiff made delivery of the sand in compliance with its contract, and that the loss which thereafter occurred should be borne by the defendant. The plaintiff is entitled to recover the value of the sand, which the court has found to be $267.80.

As to the loss of the barge another question is presented. The court has found that the place where it was moored was a reasonably safe place for the purpose. It follows that the defendant, in directing it to be moored there, exercised ordinary care, and this under the law was all that it was called upon to exercise.

This was not a commercial wharf. The defendant was a consignee and not a wharfinger, and could not be held for anything but reasonable care. *Conklin* v. *Staats Co.*, 161 Fed. 897, 899. But more than this, if danger there was, it appears to have been equally well known to the plaintiff, and where the facts as to danger are as well known to the plaintiff as to the defendant, the latter, though a wharfinger, would not be liable. *Panama Railroad Co.* v. *Napier Shipping Co.*, 166 U. S. 280. Even a wharfinger, which the defendant was not, does not guarantee the safety of vessels coming to his wharf. He is only bound to exercise reasonable care and diligence in ascertaining the conditions. *Smith* v. *Burnett*, 173 U. S. 430.

But, aside from this, there are other elements to be considered. It appears that this barge was three years old, was not in good repair, with some of the deck planks missing,

and was unseaworthy in rough weather. It was of the deck-lighter type, that is to say, the load was placed on the deck and not in the hold. On account of the said condition of the deck, due to the absence of deck planks, waves breaking over would tend to fill the hold with water. More than this, the cause of the sinking and breaking away of the barge was an unusual storm, which blew up suddenly, with high winds and waves. This weather condition was an occurrence for which the defendant can not be held responsible. It was an inevitable occurrence (see *Meyer* v. *Pennsylvania R. Co.*, 125 Fed. 428), and certainly, taken in connection with the condition of the barge and the fact that the place where it was moored was an ordinarily safe place, the defendant can not be held liable for its loss. It is true that the plaintiff objected to mooring the barge at the wharf as not being a safe place, but in view of the fact that it had been the custom for some time previous to anchor barges there, and of the finding of the court that this was a reasonably safe place, its protest is not of weight. Certainly it is apparent that the plaintiff had equal knowledge and opportunities for knowing the character of the place. In the face of its opinion that it was a dangerous place, it nevertheless moored the barge there. By deliberately placing its property in jeopardy it could not thereafter hold the defendant liable for the loss by a mere notice that it would do so. It could have refused to moor at the place. It did not do so, but after protesting it finally acquiesced in the arrangement and moored the barge at the place designated. See *Panama Railroad Co. case*, *supra*.

The defendant therefore can not be held liable for the loss of the barge. The plaintiff is entitled to recover for the value of the sand in the sum of $267.80, and it is so ordered.

GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

ROBERT HUGGER AND EMIL S. HUGGER, CO-PARTNERS, DOING BUSINESS UNDER THE NAME OF HUGGER BROTHERS, AND THOMAS G. HAIGHT, AS RECEIVER OF BUTTERWORTH-JUDSON CORPORATION, FOR THE SOLE USE AND BENEFIT OF SAID HUGGER BROTHERS, v. THE UNITED STATES

[No. E-347. Decided June 18, 1928]

On the Proofs

Statute of limitations; cause of action; suit for subcontractor's fee; approval by construction division of Army; decree of release in receivership proceedings.—(1) Where a cost-plus-profit contract with the Government provided that the prime contractor should not be required to make any payment to the subcontractor until the same was authorized and approved by the construction division of the Army, the cause of action in the prime contractor, suing for the use and benefit of the subcontractor for a contract fee, did not arise and the statute of limitations did not begin to run before the construction division authorized and gave its approval to the payment.

(2) Where the cause of action in the circumstances recited arose after the court having jurisdiction of receivership proceedings, the prime contractor having become insolvent, decreed a judicial release to the United States of all claims arising out of the contract, the decree did not include release as to the subcontractor's fee.

The Reporter's statement of the case:

Mr. Philip J. Ross for the plaintiffs. *Mr. William J. Dodge* was on the brief.

Mr. Dan M. Jackson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiffs are partners doing business under the firm name of Hugger Brothers and are residents and citizens of the State of Alabama and of the United States.

Reporter's Statement of the Case

II. The Butterworth-Judson Corporation, a corporation created and existing under the laws of the State of New York, entered into a written contract with the United States, dated May 9, 1918, which is annexed to the petition as Exhibit A and made a part of this finding by reference. By the terms of this contract the contractor agreed to select a site and to design, construct, and equip thereon a plant for the production of picric acid, all at the cost and expense of the United States, and then to manufacture for the United States seventy-two million pounds of said acid, unless the contract was sooner canceled by the Government, provision for which was made in the contract.

III. On May 22, 1918, the said Butterworth-Judson Corporation and the United States, under Articles XVI and XVII of the aforesaid contract of May 9, 1918, entered into a supplemental contract, providing for an advance to the contractor of $1,500,000, for use on the contract work, and also providing that the contractor secure the Government for said advance by giving its demand note to the Government for said sum of $1,500,000 and a secured bond in the sum of $750,000. A copy of said supplemental contract is attached to the petition, marked Exhibit I, and made a part hereof by reference.

IV. The bond provided for in the said supplemental contract was furnished. The United States advanced $1,500,000 to the contractor and the latter gave its note for said amount as agreed. The contractor deposited the money in certain banks in special accounts and entered upon the performance of said contracts.

V. Under date of June 18, 1918, the Butterworth-Judson Corporation entered into a written subcontract with the plaintiffs for certain construction work required of the Butterworth-Judson Corporation under its said contracts with the United States, which subcontract was approved on September 9, 1918, by Brigadier General R. C. Marshall, jr., representative of the contracting officer for the United States. A copy of said subcontract is annexed to the petition as Exhibit B and is by reference made a part hereof.

VI. A copy of the principal contract of May 9, 1918, between the Butterworth-Judson Corporation and the United

States and a copy of the contract described in paragraph 2 under Terms of Agreement as Contract for Emergency Work, Construction Division, United States Army, Fourth Edition, were attached to and made a part of plaintiff's said subcontract of June 18, 1918, and are annexed to the petition as Exhibits A and C, respectively, and made a part of this finding by reference.

VII. Shortly after the armistice, and on or about December 6, 1918, the United States terminated the contract of May 9, 1918, with the Butterworth-Judson Corporation, at which time no picric acid had been manufactured, and the plant was only partially constructed.

Upon the allegations in a creditors' suit in the United States District Court for the Southern District of New York, entitled "*Hay Foundry and Iron Works* v. *Butterworth-Judson Corporation*," Equity No. E–23–324, that the contractor, the Butterworth-Judson Corporation, was unable to pay its debts, the court, on April 22d, 1922, appointed receivers for said corporation.

The plaintiffs herein were not parties to said action. In said proceeding the plaintiffs herein filed the claim set forth in the petition in this case. On July 8, 1926, with plaintiffs' consent, said United States District Court entered the following order:

"Ordered that the claim of Hugger Brothers against the defendant, Butterworth-Judson Corporation, in the sum of fourteen thousand sixty-two dollars and four cents ($14,062.04) verified August 9, 1922, and filed with the receiver, be, and the same hereby is, withdrawn, said claimant, by consent to this order, electing not to prosecute its claim against the assets of the defendant company in receivership."

Without the plaintiffs' conceding its materiality or relevancy, it is conceded that neither the said contractor nor its receivers had, on April 22, 1922, fully accounted to the United States for the said advance of $1,500,000, or interest thereon, except $348,550, leaving unaccounted for, as the United States claims, the sum of $1,151,450. The total bank balance in the said special accounts of the Butterworth-Judson Corporation on April 22, 1922, was $519,631.99, on which there was an equitable lien in favor of the United States.

The United States in January, 1923, filed a bill of complaint in equity in the United States District Court for the Southern District of New York against the Butterworth-Judson Corporation and others, not including the plaintiffs, for an accounting of the moneys advanced to it under the aforesaid agreements and still due the United States (*United States et al.* v. *Butterworth-Judson Corporation et al.*, 267 U. S. 387).

On July 25th, 1926, by the agreement of the parties, not including the plaintiffs, said United States District Court entered an order consolidating the said two actions and finally determining them. The money therein specified has been paid to the United States pursuant to said agreement and order.

VIII. The plaintiffs in due time began the performance of their said subcontract with the Butterworth-Judson Corporation and continued in the performance of the contract until on or about December 6, 1918, when the United States terminated the contract of May 9, 1918, with the Butterworth-Judson Corporation, because the need for the plant and its output had ceased to exist.

IX. The total fee received by the plaintiffs under their said subcontract with the Butterworth-Judson Corporation was the sum of $106,350.32. This sum was paid to the plaintiffs by the Butterworth-Judson Corporation and does not include any part of the claim in this case.

X. In the construction of said picric-acid plant the plaintiffs unloaded, handled, and placed as directed by the Butterworth-Judson Corporation certain lead furnished with the approval of the contracting officer for lead-burning work, and said lead entered into and was used in the construction of said plant.

XI. The plaintiffs submitted a claim No. 842473 for a fee of $14,062.04 for the unloading, handling, and placing of said lead, based upon the cost thereof to the War Department, this fee being at the rate provided in the contract. The War Department, on or about May 26, 1922, issued and transmitted to the General Accounting Office a voucher for the direct payment to the plaintiffs of the sum of

$14,062.04, covering said fee. The General Accounting Office on or about April 2, 1922, disallowed said claim. Thereafter said claim and said decision of the General Accounting Office were referred to the Comptroller General of the United States, and on or about June 21, 1922, said disallowance was sustained (Review No. 2029). A copy of said disallowance is annexed to the petition as Exhibit D and made a part of this finding by reference. Said claim was submitted to the Construction Division of the Army and was by said Construction Division submitted to Lieut. Col. W. A. Graham, Judge Advocate. On June 20, 1922, said Lieut. Col. W. A. Graham rendered a written opinion. On June 22, 1922, Brigadier General J. A. Carson, Quartermaster Corps, representing the officer in charge of Construction Division, contracting officer, signed and issued a letter addressed to said Butterworth-Judson Corporation, a copy of which is annexed to the petition as Exhibit F.

Without defendant's conceding its materiality or relevancy, it appears that Hugger Brothers were pressing this claim through the United States Attorney at New York City, that the United States Attorney took up this claim with the Advisory Council of the War Transactions Section of the Department of Justice to ascertain whether the payment of this claim would prejudice the Government's suit against the Butterworth-Judson Corporation, and that thereupon the Advisory Council advised the Attorney General that the payment of this claim would not prejudice the aforesaid suit and also prepared for the Attorney General's signature a letter to the Secretary of War dated April 10, 1923, which the Attorney General signed, calling the attention of the Secretary of War to this claim and stating, among other things, that—

This department has no objection to the payment of this claim for any reason based on the suit now being prosecuted by the Government against the Butterworth-Judson Corporation. It is felt that the liability of the Government to Hugger Brothers for the payment of this claim under the provisions of such contract is absolute, the same having been approved as aforesaid by Brigadier General Carson.

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On July 23, 1924, the Comptroller General of the United States again disallowed said claim.

XII. No part of said claim or any fee for the unloading, handling, and placing of said lead has been paid to the plaintiffs.

The court decided that Thomas G. Haight, receiver, was entitled to recover $14,062.04 for the sole use and benefit of Robert and Emil S. Hugger, copartners.

Moss, *Judge*, delivered the opinion of the court:

On May 9, 1918, the Butterworth-Judson Corporation entered into a contract with the United States by the terms of which the contractor was to design, construct, and equip a plant for the production of picric acid and to manufacture and deliver to the Government 72,000,000 pounds of such product, for which the Government was to pay to the contractor actual cost plus certain percentages of profit. It was provided in said contract as follows:

"ARTICLE V. *Subcontracts.*—The contractor may with the written approval of the contracting officer perform any part of the construction work under this contract through the means of subcontracts, but such subcontracts shall contain a reference to this contract and an express provision that they are subject to all provisions hereof and that they may be assigned by the contractor. * * * "

"ARTICLE XVI. *Moneys to be advanced by the United States.*—The contracting officer shall on the delivery of this contract recommend to the War Credits Board that it approve an advance payment to the contractor for the supplies herein contracted for in the sum of $1,500,000 upon such terms and conditions and secured in such manner as said board shall prescribe. * * * "

"ARTICLE XXVI. *Termination of contract.*—This contract, including any extension thereof, may be terminated and cancelled by notice in writing to the contractor by the Chief of Ordnance, as follows:

"1. At any time because the need for the plant or its output has ceased to exist; * * *."

"In any case termination for the first-named cause all obligations of the contractor necessarily incurred hereunder outstanding at the date of the termination or which may thereafter arise shall be assumed by the United States, and

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the United States shall save harmless the contractor in respect of all liabilities in connection therewith."

On June 18, 1918, the contractor entered into a written contract with Robert Hugger and Emil S. Hugger, copartners, doing business under the name of Hugger Brothers, for certain construction work required of the contractor under its principal contract of May 9, 1918, which subcontract was duly approved by the authorized representative of the contracting officer of the Government. The specific services required of Hugger Brothers under their subcontract were the unloading, handling, and placing certain lead, as directed by the Butterworth-Judson Corporation, for which Hugger Brothers were to receive as compensation a fee or commission based upon the cost of the lead to the War Department.

On or about December 6, 1918, the United States terminated the contract of May 9, 1918, for the stated reason that the need of the plant and its output had ceased to exist. Thereafter, and in due time, plaintiffs, Hugger Brothers, submitted their claim for balance for services rendered under their contract in the sum of $14,062.04, which claim was allowed by the War Department and transmitted to the General Accounting Office for direct payment to plaintiffs, and on June 2, 1922, said claim was disallowed. On April 22, 1922, in a creditors' suit in the United States District Court for the Southern District of New York, Thomas G. Haight, one of the plaintiffs in the amended petition, filed March 29, 1928, was appointed as receiver for the contractor, Butterworth-Judson Corporation.

The original petition herein was filed on May 25, 1925, by Robert Hugger and Emil S. Hugger, copartners, doing business under the name of Hugger Brothers. On July 24, 1925, defendant filed a general traverse. On March 3, 1927, an agreed statement of facts was filed. On February 28, 1928, the case was argued and submitted on its merits, and on March 5, 1928, it was remanded by order of the court with leave to plaintiffs to amend their petition, the order containing the following memorandum: "It appears to the court that a suit by the contractor, for the use of the plain-

tiffs, or by the receiver of the contractor, for the use of plaintiffs, might be maintained, and the court therefore gives the plaintiffs an opportunity to make an amendment accordingly." Thereafter, on March 29, 1928, plaintiffs filed an amended petition making said receiver, Thomas G. Haight, a party plaintiff, suing for the sole use and benefit of Hugger Brothers. It is now the contention of defendant that the receiver is barred from recovery herein by the statute of limitations, section 156 of the Judicial Code. It will be observed that the contract between Butterworth-Judson Corporation and Hugger Brothers contained the provision, "The contractor shall not be required to make any payment to the subcontractor pursuant hereto, unless and until such payment shall have been authorized and approved by the construction division of the Army as an expenditure for which the contractor is entitled to reimbursement under the main contract of May 9, 1918." One of the grounds for the disallowance of payment on the claim in controversy, was that the claim had not been approved by the construction division of the Army. Thereafter, on June 22, 1922, the payment of said claim was duly authorized and approved in writing by said construction division of the Army. It was not until June 22, 1922, that Butterworth-Judson Corporation could have been required to pay said claim. This was therefore the date of the accrual of a cause of action in favor of Butterworth-Judson Corporation on account of said claim. The amended petition asserting the right of recovery by Haight, receiver, suing for the use and benefit of Hugger Brothers, was filed March 29, 1928, which was within the period of the statute of limitations.

It is also urged by defendant that said receiver is barred from recovery by virtue of a decree entered in the New York District Court in the receivership action, consolidated with an action brought by the United States against Butterworth-Judson Corporation, whereby the court decreed a judicial release of the United States "from all claims and demands of the Butterworth-Judson Corporation, and its receiver, arising out of the contracts of May 9, and May 22, 1918, respectively, set forth in the bill of complaint in the suit by the

United States of America, against Butterworth-Judson Corporation, et al." Defendant's contention on this point is not tenable. On June 22, 1922, when payment by Butterworth-Judson Corporation might legally have been demanded said corporation was in the hands of the receiver, and all payments by it had been suspended. Butterworth-Judson Corporation, not having paid the Hugger Brothers' claim, had no claim against the United States on account of same at the date of the entry of said decree, nor was said claim involved in any manner in the decree referred to. It should also be noted that the court which entered said decree specifically retained jurisdiction in said consolidated actions, and by judgment entered March 29, 1928, authorized and directed the receiver to join as party plaintiff in this action and to demand that payment be made of the claim of Hugger Brothers for their sole use and benefit.

The court is of the opinion that Haight, receiver, is a proper party plaintiff, and is entitled to recover herein for the use and benefit of Hugger Brothers, and it is so adjudged and ordered.

GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

M. H. McCLOSKEY, JR. (INC.), TO THE USE OF THE UNITED STATES FIDELITY & GUARANTY CO., v. THE UNITED STATES

[No. C-975. Decided June 18, 1928]

On the Proofs

Contract in writing; inducement; parol agreement.—Where a Government contract provides in writing that work on the construction of a building shall commence "when site is completely cleared" and be finished within 10 months after it is begun, evidence that the Government verbally agreed to clear the site at a definite date, as an inducement to the written contract, does not vary the terms thereof and is admissible to establish a distinct agreement.

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Same; absence of definite date; reasonable time.—Under the circumstances recited the Government was obligated by the written contract to clear the site within a reasonable time.

Same; breach; right to perform and recover damages for delay.—Where the Government agrees to clear the site for a building at a fixed time, and delays in clearing the same, the building contractor has the right to perform his part of the contract and, in the absence of acquiescence, recover damages for the delay.

The Reporter's statement of the case:

Mr. Edwin C. Brandenburg for the plaintiff.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. M. H. McCloskey, jr (Inc.), plaintiff, is a corporation duly organized under the laws of the State of Pennsylvania and the United States Fidelity & Guaranty Company is a corporation organized under the laws of the State of Maryland.

II. The United States Government, through its duly authorized representatives, advertised for proposals to be opened on March 27, 1919, for the construction of the south wing of the south cadet barracks and guardhouse, forming an extension at the southwest angle of the existing barracks at West Point, the Government to provide the site and excavate and clear the foundation upon which the said building was to be erected. Plaintiff submitted a proposal to erect said building for the sum of $438,464, which proposal was thereafter modified at the instance of the Government by certain alternate proposals and deductions in order to bring the cost within the appropriation. As so modified said proposal was in due course accepted and a contract therefor in the sum of $408,188.64 was duly entered into by and between the plaintiff and the Government on May 1, 1919. A copy of the said contract is attached to the petition marked " Exhibit A " and is made a part hereof by reference. The specifications are made a part of the contract and are attached to the petition marked " Exhibit C," and are made a part hereof by reference.

III. A provision of said contract required plaintiff to furnish the United States a bond conditioned for the faithful performance of said contract and for the payment of labor and material entering therein; and in accordance therewith the United States Fidelity & Guaranty Company became surety upon the said bond in the penal sum of $225,000, which bond was accepted and approved by the Government. A copy of the said bond is attached to the petition marked "Exhibit B" and is made a part hereof by reference.

IV. Plaintiff completed the construction in accordance with the contract and was paid $395,573.45, which is the amount that plaintiff admits was due on the contract less $3,220 which was deducted as liquidated damages. The contract price included a further sum which was deducted on account of material furnished by the Government. The actual outlay on the part of the plaintiff in connection with the completion of this contract was $618,083.67, which was exclusive of any profits. The plaintiff estimated the total cost of completion at $369,548.08 and at the time the proposal was submitted all of the work under the contract could have been done within the estimated price, and several items of the work which could have been done for less than the estimated price under the subcontracts. The difference between the estimated price for completion and the contract price was $38,640.56, which represented plaintiff's anticipated profit on the contract.

V. Prior to the submission of its proposal, plaintiff sent its representatives to West Point to examine the site and make such investigation as might be necessary to enable it to make the necessary estimates and submit its proposal. On the occasion of this investigation, it was found that the site upon which the building was to be erected had not been completely cleared, and the Government was advised that the time at which the excavation would be completed would make a difference in the bid, and that said bid would be lower if work could be started early in the summer. Thereupon the representatives of the Government agreed to have the site cleared and ready by July 1, 1919. Upon this statement plaintiff submitted a proposal to do said work within

ten months after the site was cleared. Section 24 of the specifications provided that "proposals submitted should state the number of days, including Sundays and holidays, which will be required to finish the whole after signing the contract."

VI. The building covered by the contract was to abut and join an existing cadet barracks. As preliminary to the erection of the new building, it was a part of the Government's contract to remove the window sash, framework, and stone arches of certain openings in the existing barracks, and cut the necessary toothing to bind in the brickwork. It was a part of the plaintiff's contract to close these openings and this had to be done during the summer vacation and prior to September 1st. In July, 1919, after the cadets had left for their vacation, the Government tore out the sashes, framework, and arches, and about the middle of July, Mr. Goding and Mr. Sussex, representatives of the Government, ordered plaintiff to close these openings, which it proceeded to do, sending to Philadelphia for a bricklayer foreman and bricklayers who did the work. They arrived about July 20th.

VII. Soon after May 1, 1919, the date of the contract, the Government began urging plaintiff to begin operations under the contract. Between May 6, 1919, and May 10, 1919, Colonel Timberlake, the superintendent, inquired when plaintiff would get started, and when informed that the site was not ready he replied, "Get in there and get started and we will have this site cleared out before the first of July and by the time you get the organization on the site." It appearing that the site could and would be cleared by July 1st, plaintiff's representatives returned to Philadelphia and arranged to ship their plant. Thereafter controversies arose between the agents of the Government, who urged that the work be begun, and the plaintiff or its agents, who called attention to the fact that the site had not yet been made ready. The Government's agents in particular requested that the concrete be poured for the foundations and the pits for the columns, although the excavation for the building had not been completed. Plaintiff sent equipment and men to the

work at the quarry and before the excavation work was entirely completed poured the foundations.

VIII. The Government failed to clear the site by July 1, 1919, as it had agreed to do, but cleared the same in installments thereafter as hereinafter set forth. The excavation of the site for the main building had not been completed by April 1, 1920 (the date from which the Government began to count liquidated damages), and the excavation of the trenches for the walls of a portion of the main building was not completed until about May 1, 1920.

The Government was also required by the contract to excavate the rock for the steam tunnel, of which tunnel twenty feet had to be built by the plaintiff and tied to the walls of the main building when constructed. As late as June 11, 1920, the Government had not excavated for the footings of said tunnel.

It was a part of the Government's duty in clearing the site to make the necessary excavation for the sewer and drain pipes. In fact it was excavating trenches for the plumber in the guardhouse as late as May 11 and 12, 1920.

In clearing the site it was also a part of the Government's duty to excavate an area around three sides of the building, the one on the north side being 245 feet in length and 20 feet wide, and it was also its duty to make the necessary excavation for the steps. It was plaintiff's duty after the same had been cleared to erect the area walls, steps, porch floors, and porch roof over the entire area. There was also an area on the east side of the guardhouse which was to be excavated by the Government which it failed to complete until January, 1921, at which time the main building had been erected. Plaintiff's contract could not have been completed until the area and steps had been excavated by the Government.

At the time the Government was blasting in one areaway, plaintiff was obliged to leave that areaway and work on another that had been excavated.

Plaintiff on several occasions urged the Government to complete the excavation in order that its work might be prosecuted in accordance with the terms of the contract with diligence and in orderly sequence.

IX. The contract provided that the site upon which the building was to be erected should be cleared by the Government, which also agreed to excavate for the basement, foundation walls and piers, areas and steps, steam tunnel and other ducts for pipes, manholes, pits for water heater, steam traps, etc., trenches for subsoil and down-spout drains, sewer, drain, water, steam pipes, or other pipes inside and outside the building, to the required depth.

To excavate the site for the building and a road adjacent thereto required approximately 10,000 cubic yards of rock excavation. On March 31, 1919, from 40% to 50% of this rock excavation had been completed and by May 1, 1919, the date of the execution of the contract, about 35% to 40% remained to be done, thus leaving 3,500 to 4,000 cubic yards of rock still to be excavated. The site upon which the building was to be erected was 245 feet in length and 48 feet in width.

With the exercise of reasonable diligence, proper management and the use of a reasonably adequate force, the rock thus remaining to be excavated could have been removed in sixty days and the site would have been completely cleared and available for the erection of the building by July 1, 1919.

X. There were no structural difficulties in connection with the erection of the building covered by the contract, and but for the delays caused by the Government it could have been put under roof by December 1, 1919.

Because of the delays of the Government and its interruption to the orderly progress of the work plaintiff was unable to erect and deliver the building until July 11, 1921.

XI. Paragraph 7 of section 3 of the specifications provides, among other things, as follows:

"Rough excavation to be done by the Government as required by the site and drawings—for basement, foundation walls and piers, areas and steps, steam tunnel and other ducts for pipes, manholes, pits for water heater, steam traps, etc., trenches for subsoil and down-spout drains, sewer, drain, water, steam, or other pipes inside and outside the building, to the depth figured or shown, or to such depth as to provide absolute security against danger from frost or insecure foundations. The general excavation is to extend not less than

18 inches beyond outside face line of foundations and remain open until subsoil drain is laid, outer face of walls waterproofed and broken stone filling placed. * * *

"The Government is to do all blasting of rock necessary to attain the required depths for the several portions of the work, and leave such excavation free from débris. All natural rock foundations are to be leveled or stepped properly to receive foundations. Rock ledge to be removed within the limits of outside grading to a depth of 12 inches below finished grade and inside the building to a depth of not less than 10½ inches below the finished basement and area floors."

The Government failed to deliver the site in the condition required by the contract, but left it in an unfinished and incomplete condition. The rock ledge was not brought within 10½ inches of the floor level as set forth in the specifications or leveled to the depth shown on the drawings, but on the contrary the Government left it with jagged rocks and deep holes, in places three to six feet below the cellar bottom, so that it was practically impossible to travel or work across it without runways and scaffolding. In places the cavities were much deeper than the line of waterproofing indicated on the plans. Many of the rocks extended above the height of the basement floor, in some cases several feet, and had to be removed by the Government when plaintiff began pouring concrete for the floors, some of these rocks being blasted, others knocked off with a sledge hammer, and others were drilled off. Rock, broken stone, and débris were left by the Government over the site, with the result that added labor was imposed on the plaintiff to work over or have the same leveled, and in addition required extra material to bring the site up to the required level for the purpose of laying the basement floor.

XII. The contract provided that "all natural rock foundations are to be leveled or stepped properly to receive foundations." The Government did not leave the trenches for the foundation leveled or stepped, nor were they of uniform or proper depths or widths. In many places they were deeper than the elevation shown on the drawings and had been left in the condition in which they had been blasted without any attempt to clear the same. Because of this failure of the

Government to level or to step these trenches, there were many places in which it was absolutely necessary to drill into the rock and place dowels to hold the concrete and prevent it from slipping when poured.

Because of the unevenness of the trenches plaintiff was required to build forms from 3 to 5 feet in height to hold the concrete when poured to conform to the jagged and rough condition of the rock instead of being able to use a longitudinal form. This required additional carpenter work and increased the cost and delayed prosecution of the work.

Because of the uneven, irregular, and jagged condition in which the site was left, it was impossible to pour the concrete from the basement floor, as is customary, but runways and scaffolding had to be constructed over which the workers could walk, and from which the cement could be poured into the forms for the foundations.

The specifications provided that "the general excavation is to extend not less than 18 inches beyond outside face line of foundations." Notwithstanding this requirement, the trenches in places were many feet wide, which required that they be bridged in order that they might be passed over for plaintiff's men to conduct operations.

It is customary to erect the basement walls from the floor of the basement, but in this case, because of the wide trenches and irregular condition of the foundation, scaffolding was required upon which the men could work and handle the stone. In order to support the first floor, shorings were required, but because of the unevenness of the surface, these shorings varied in height and had to be cut accordingly, with the result that much of the lumber could not be reused and was lost.

XIII. The building to be erected under the contract was in the nature of a parallelogram, and abutted at right angles the southwest end of an existing barracks. There were six divisions in the barracks thus to be erected, each separated from the other by a dividing wall. Each division was approximately 40 feet in length. The outside dimension of the barracks thus to be erected was 48 feet by 245 feet, while the outside dimension of the guardhouse which was at

the extreme end of the barracks was 48 feet by 62 feet. The Government was to clear the site and blast the rock necessary to attain the required depth for the several portions of the work, and leave such excavations free from débris.

The guardhouse end of the site which was in clay and loam, had been cleared by the Government and made ready early in May, 1919, and the trenches for the foundation walls and pits for the columns had been dug.

In accordance with the directions of the Government, plaintiff poured the concrete for the foundation of the guardhouse end and for the pillars early in July, 1919, progressing as far as the first cross wall dividing the guardhouse from the cadet barracks. When this had been accomplished the work was tied up and could progress no further until more of the site had been cleared and the Government had removed its derrick and stone piled on the site, which the Government intended for use in the crusher. This interfered for several weeks with the erection of the cross wall. When more of the foundation had later been excavated and cleared plaintiff resumed the pouring of concrete for the foundation in the newly uncovered area. This course was pursued as each installment of foundation was cleared and turned over to plaintiff until about May 1, 1920, when the last of the foundation for the main building was finally cleared and delivered, whereupon plaintiff poured the concrete for the balance of the foundation and proceeded to bring all the walls to the required height.

As the foundations were uncovered and delivered in installments plaintiff had to step up the building and erect it in installments, the walls of the guardhouse end having been erected to the floor of the second story before stone could be set in the walls of the adjoining section. The customary method of constructing a building of this character is to erect all the walls simultaneously because it is more economical and expeditious and allows the employment of a larger force with less superintendents. The method plaintiff was thus required to pursue was more expensive and delayed the progress of the work.

XIV. During the period of delay so caused by the Government the price of material advanced. At the time of the submission of its proposal plaintiff made an estimate of the cost of the material required at the prevailing prices. Assuming that the site would be cleared by July 1, 1919, the building could have been completed within the contract price at that time.

Plaintiff at the time of submitting its estimates had secured subcontracts for all the work and material required in the erection of the building except for cutting the stone, masonry work, concrete, and certain minor items.

The failure of the Government to have the site ready by July 1, 1919, was the principal reason for throwing the work of construction into the years 1920 and 1921. Beginning with the spring of 1920 and extending into 1921, there was a material increase in building operations throughout the United States as compared with that of the year 1919. This resulted in a corresponding increase in demand for material, in consequence of which material men became more independent and refused or were unable to make prompt deliveries, and then only at a substantial advance in price. Such increase varied from forty to seventy-five per cent.

Beginning with the month of June, 1920, further difficulties were encountered by reason of the existence of an embargo on certain of the eastern railroads which greatly reduced deliveries of material and made it almost impossible to secure such deliveries except by making the consignment to some Government official and then after long delays.

When the building was ready to receive the material and work covered by the various subcontracts held by the plaintiff, many of said subcontractors declined to perform and others only at a material advance in price over that agreed upon, because of the increased cost of labor and material.

XV. During the period of delay caused by the Government, there was an increase in the cost of labor. During the year 1919 and early in 1920 there was an abundant supply of labor and no difficulty was encountered by plaintiff in securing all of the skilled and unskilled labor that was

required and necessary to promptly erect the building. The demand for labor throughout the country increased with the spring of 1920 and continued through the year 1921 though to a lesser extent, with the result that there was a general shortage of labor, which shortage plaintiff experienced on this job, and there was a material advance in wages. This increase in wages for both skilled and unskilled labor for the year 1920 was from thirty to one hundred per cent over that for the year 1919.

Although plaintiff was obliged to pay a material advance in wages, the efficiency of the men decreased and their independence increased, which resulted in a material loss to the plaintiff.

XVI. The Government delayed the quarrying of stone. The contract provided that the stone for the ashlar facings of the exterior walls and cut stone not otherwise specified was to be quarried by the Government on the West Point reservation and set by the plaintiff.

On May 19, 1919, the Government notified the plaintiff that considerable progress had been made in quarrying the stone and that it was advisable for plaintiff's foreman to be put on the job for the purpose of indicating the size of the stone desired. A conference was thereupon had with the Government's representative, as a result of which the necessary equipment was shipped to West Point, together with foreman and laborers to level the quarry, build the shacks and necessary shops. On May 20, 1919, plaintiff's superintendent of stonecutting arrived on the job with a force of nine mechanics or stonecutters, and the necessary laborers, which were subsequently increased to thirteen mechanics with the necessary laborers, which as a rule were four or five to every seven mechanics. The cutters later were increased to forty-five, which were as many as could be kept busy upon the amount of stone that was quarried by the Government.

There was actually required for use in this building approximately 35,000 cubic feet of stone, which necessitated the quarrying by the Government of approximately 50,000 feet. This stone should have been quarried within four months

in order that proper progress might be maintained. By the exercise of reasonable diligence all the stone could have been quarried in less than 90 days. The Government failed, however, to make reasonable progress, with the result it was more than a year in quarrying the stone, the stone for the porch piers not being quarried as late as June, 1920. Because of this delay in progress made by the Government, plaintiff was required to cut much of the stone in the winter when slower progress was made, and at a later period than that at which it should have been done, in consequence of which plaintiff encountered substantial increase in the pay of cutters, as well as in the handling, sorting, hauling and rehandling of the stone, when it was needed in the building. The cost of cutting stone in the winter was also more expensive and slower than in the summer months. The pay of these men in 1919 was 79¢ an hour and in 1920 from $1 to $1.12½ an hour.

At times there was a shortage of stone to be cut which resulted not only in delay but interfered with the orderly progress of the work, which required the men to be shifted.

Because of a shortage in stone of the proper size at the quarry, and in order to keep the men together, plaintiff was required to recut a lot of old stone, the refuse from a demolished building, which because of its age was much harder, more difficult, and expensive to cut than fresh stone.

Under the contract the Government was required to furnish the plaintiff compressed-air surplus not required in the Government's quarrying operations, or its other purposes. The pipe lines furnishing the air froze in the winter because of the failure of the Government to take proper precautions, and because of inefficient equipment. This interfered with progress in drilling and cutting the stone.

XVII. The specifications provided that—

"All stone for ashlar facings of exterior walls, and cut stone not otherwise specified, will be quarried by the United States on the West Point reservation. The contractor to do all teaming, cutting, and setting of same. To be random, squared, jointed ashlar with pointed faces, corresponding with present wall facings near junction with new extension.

"Wall facings to be cut in courses of even thickness as shown by drawings if stone supplied from quarry is of suitable character for such work."

In accordance with this provision of the specifications, plaintiff cut approximately 42,000 stones, which number were required for the walls of the building covered by the contract. These stones varied in size from 4" x 4" to approximately 14" x 26". As the stones had to be cut to conform to drawings, they were necessarily cut to a specified size as detailed in the plans, and every piece was numbered indicating the point where it was to be placed in the walls. It is customary where stone is cut to size to conform to drawings to store it in small piles and then place it in the wall soon after being cut. In this way a large stock would not be provided in advance.

Promptly after the arrival of the men at the site, they began cutting stone with a view of having a surplus on hand by July 1st, when plaintiff was informed by the Government that the site would be cleared and ready for the erection of the building. The first stones cut were those which were intended for the first floor lines. As the Government failed to clear the site by July 1, 1919, but delivered portions of it in installments extending to May 1, 1920, plaintiff could not carry on this work as a continuous operation but was required to erect the walls in sections, and then step them up instead of carrying up all the walls simultaneously. For this reason plaintiff was unable to use this stone as it was cut and was required to pile it wherever possible adjacent to the site of the building. When the wall or section of a wall reached the stage needing a particular stone some difficulty was encountered in locating it in the great mass that had been cut and piled. As the particular stone needed was often at the bottom of the pile, these piles had to be handled and rehandled which would not have been necessary had plaintiff been given the site on the day agreed upon, so that the walls could have been erected simultaneously. For the same reason some of the stones could not

be found when required, while others were weather beaten and the numbers washed off as a result of many months' exposure, and some that could not be located had to be recut.

For the reasons aforesaid the progress of the work was delayed and the cost of construction materially increased.

Owing to the delay in clearing the site and the method in which the building had to be erected, it cost the plaintiff $136,001.10 to furnish the materials and labor in connection with the stone masonry, cut stone, and setting Rockport granite. This work, as provided in the contract and subsequently changed at the instance of the Government under certain alternates, could have been done for $69,172 had the site been cleared as agreed upon. As a result of the delays thereby incurred, plaintiff sustained a loss of $66,829.10.

XVIII. By reason of the site not being cleared by July 1, 1919, the work could not be done as a continuous operation, two winters were required instead of one, and the cost of materials and labor was greatly increased with the result that the concrete work actually cost plaintiff $89,801.80; whereas if the site had been cleared at the time agreed upon, this work, including materials and labor, could have been completed for $49,729.50; and the plaintiff thereby sustained a loss of $40,072.30.

XIX. The grade and fill required by the final contract could have been done at the time it was made for $284, whereas this work actually cost $1,823.72, resulting in a net loss of $1,539.72. This work involved the stone fill around the building, and grading of the basement floors. The loss was due to the fact that the basement floor had not been left 10½ inches below the finished grade, and the lines of the trenches were not approximately 18 inches from the exterior face of the walls as called for by the contract. The actual time devoted to this work was 2,918 hours, at an average of 62½ cents per hour, which amounted to $1,823.72. The estimate was based on 45 cents an hour for 631 hours, whereas when the work was done labor had advanced to 62½ cents an hour, and 2,918 hours were used for this purpose.

XX. Plaintiff in its proposal estimated the brick masonry at $15,056, which was increased at the instance of the Government by two alternates subsequently submitted to the extent of $2,675, less a credit of $276, making the total estimated cost $17,455, for which sum it could have then been completed. This estimate included not only the brick but the mortar. In view of the delay and the fact that the brickwork could not be placed as a continuous operation, but was frequently interrupted on account of the manner in which the site was delivered and the building had to be erected, this work actually cost the sum of $25,359.24, showing a loss thereon of $7,904.24.

XXI. Plaintiff was to install the necessary heating and ventilating system and also the plumbing and drainage system. The Government was to make the necessary excavation for the sewer drain and water pipes. All horizontal lines of pipe had to be supported by brick piers 12 inches square, not more than 5 feet apart. Owing to the failure of the Government to excavate the foundation in accordance with the requirements of the contract, and the difference in elevation of various parts of the site as thus excavated, these brick piers, instead of being of a comparatively uniform height, varied from one to five feet in height, which would not have been necessary had the site been properly excavated. In some cases plaintiff had to suspend building these piers in order that the rocks might be cut off by the Government where they projected above the proper level.

In excavating the trenches for the underground plumbing the Government did not conform to the requirements of the specifications, but these trenches in many places were left 8 to 10 feet deep just as blasted, and had to be built up by plaintiff, and in other cases where the rocks projected above the proper level they had to be feathered or drilled off in order to get the soil pipes through. In some places these trenches were 7 or 8 feet wide.

Because of the delay in furnishing the site and the inability to erect the building in accordance with the provisions of the contract plaintiff was required to maintain

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plumbers upon the job through the full period of 24½ months, the soil pipes being put in as each section of the building was made ready.

Plaintiff sublet the contract for the heating, plumbing, and drainage for $45,000 complete, which was $10,000 less than the estimate made in its proposal. An alternate for certain material to be furnished by the Government reduced the cost by $2,214.46, showing that the work could have been completed for $42,785.54 but for the delays on the part of the Government. Because of these delays, the subcontractor refused to perform the work and plaintiff was obliged to purchase the necessary material and do the same at a total cost of $70,742.02, thereby causing a loss to him of $27,956.48. [1]

XXII. At the time of making the final contract the plastering on the building could have been done for $38,539. Inasmuch as the plastering could not be done in the winter of 1919 and 1920, but had to be done in December, 1920, and January and February, 1921, the subcontractor refused to perform at the contract price, as the cost of the labor and material had materially advanced, with the result that plaintiff actually paid these contractors the sum of $45,130.29 for this work after eliminating the alternates, showing an actual loss on account of the money expended of $6,591.29. In addition to this amount, the subcontractors still hold a valid claim against the plaintiff growing out of this contract in the sum of $10,000, making the aggregate loss on this item $16,591.29.

XXIII. Because of the failure of the Government to deliver the site completely cleared by July 1, 1919, the plaintiff incurred additional expense for labor or materials or both in the sum of $41,076.43 with respect to the following items: Structural steel; roofing and sheet metal; millwork and setting; carpenter work; lumber and nails; marble, slate, and tile; ornamental iron; and certain miscellaneous items such as scaffolding material, temporary closing of openings, cleaning up rubbish, etc.

XXIV. Under the specifications the Government was to furnish "Steam for heating while plastering and finishing

[1] $27,796.48 claimed in the petition.

interior during cold weather." The specifications for the composition flooring provided "That a temperature of at least 65 degrees F. must be maintained at all times during laying of flooring." Plaintiff in its proposal estimated the cost of the composition floors at $16,830, which was subsequently reduced at the instance of the Government by virtue of certain alternates to $16,546. Plaintiff entered into a contract with the Special Service Flooring Corporation to place the composition flooring for the sum of $15,384. In the contract it was agreed to give them 65 degrees of heat, as set forth in the specifications. After the work started and the floors were being placed the Government, in the month of March or April, 1921, turned off the heat and refused to furnish any more. As the flooring could not be placed except at this temperature this feature of the work was suspended until warmer weather. Because of this delay and the increased cost for placing the flooring the Special Service Flooring Corporation claimed in addition to the contract price the sum of $2,835, for which amount suit was brought again plaintiff and a judgment had.

XXV. Plaintiff was required to give a bond to the United States for the faithful performance of the contract. Owing to the fact that the building was not completed within ten months as the contract stipulated, plaintiff was required to pay an additional premium of $2,997.83, due to the delay.

Plaintiff was also required to carry liability insurance on the employees engaged in this project. The actual cost for this bond was $4,662.49, showing an excess cost of $1,662.49, which was the amount of plaintiff's loss due to the increase in wages, since the premium is based on the amount of the pay roll.

XXVI. By reason of the delay caused by the Government, plaintiff was obliged to expend $16,031.37 more for overhead, including payments for superintendents, timekeepers, office and telephone, car fares, and incidental expenses, than would have been necessary had the site been cleared at the time agreed upon.

XXVII. The roof trusses necessary for the support of the roof were not delivered until February, 1920. Delays

also occurred in the delivery by plaintiff's subcontractors of material of various kinds, the last carload of reenforcing steel, essential for reenforcing the concrete floors which it was necessary to pour as the sides and interior walls progressed story by story, did not arrive on the ground until June 17, 1920; but all of these delays resulted primarily from the failure of the defendant to have the site cleared on July 1, 1919, so that the work could proceed in an orderly manner and the material be ordered and put on the ground at the proper time.

XXVIII. The inability of the plaintiff to carry on and complete the building within the time specified by the contract by reason of the delays caused by the defendant made it necessary for the United States Fidelity & Guaranty Company, surety upon bond for the execution of the contract, in the latter part of July, 1920, to finance the completion of the work and for this purpose it advanced $296,112.15, which was expended upon the building, together with the money received by the plaintiff from the Government. The actual loss of the surety company upon the contract, after giving credit for the moneys received from the Government, was $140,000. The surety company placed a man upon the job to oversee the work and the disbursement of the money advanced, thereby incurring an expense of $2,272.93, for which the plaintiff is liable.

XXIX. In making the final voucher the Government charged the plaintiff with a delay of 161 days at $20 per day upon the claim that the completion of the building had been delayed for the time above specified beyond the time within which it was required to be completed by the contract. The Government accordingly deducted from the final voucher the sum of $3,220 as liquidated damages, which amount the Government refuses to pay plaintiff.

At the very inception of the work plaintiff called attention of the Government to the fact that its failure to have the foundation excavated by July 1st would prevent the building being under roof by winter. During March, 1920, plaintiff again called attention of the Government to its failure to comply with its contract and notified the Govern-

ment that at the proper time plaintiff would ask due allowance and reimbursement for the delays to which it had been subjected. During October, 1920, the Government, through its quartermaster, was again put upon notice of such delays and the fact that plaintiff's financial embarrassment was caused by the action of the Government, and the Government was notified that plaintiff as well as its surety reserved the right to sue for damages. At the time the final voucher was submitted in the fall of 1921, plaintiff refused to sign the same without a reservation of a right to sue the Government for the loss plaintiff had incurred. Correspondence was accordingly conducted between Colonel Timberlake for the Government and McCloskey's attorneys for several months, plaintiff refusing to sign the voucher without reserving the right to sue the Government. Consequently the entire matter was submitted to the Comptroller General, who settled the matter, no voucher being signed. To the end that there might be no question that the use of the warrant covering the final payment would be deemed as payment in full, the matter was submitted to the Comptroller General and a reply received stating he did not consider that the use of the warrant would prevent the suit by plaintiff.

XXX. A fair and reasonable profit on this work is the sum of $38,640.56, which amount the plaintiff would have made but for the breaches of the contract on the part of the Government as hereinbefore set forth.

The court decided that plaintiff was entitled to recover, in part.

GREEN, *Judge*, delivered the opinion of the court:

It appears without dispute that plaintiff entered into a contract to construct for the defendant a building at West Point, New York. The plaintiff undertook the work, and with the aid of the surety on its bond completed it, but the delays which were incurred in its completion resulted in a greatly enhanced cost of labor and materials over and above what he had anticipated, and he and the bonding company incurred a large loss. Claiming that the defendant was responsible for these delays and the increased cost, this suit

has been brought by plaintiff in part for the use of the surety on its bond, to recover the damages alleged to have been sustained.

The plaintiff alleges in the petition that the defendant agreed to have the site for the building cleared by July 1, 1919. The evidence leaves no doubt that defendant failed so to do. In fact, the site was not completely cleared until some eight or ten months later. There is likewise no question but that the delay in clearing the site was the principal cause of the delay in the work upon the building.

The case turns largely on the question of whether the evidence shows that the defendant agreed to have the site for the building cleared by July 1, 1919. On this point the evidence is somewhat conflicting and we think it best to call attention to its most salient features.

Herbert S. Keffer, estimator for McCloskey, visited West Point and examined the site about a week prior to the submission of the proposal. He was accompanied by David Hoskins. They met the Government superintendent, Goding, the official in charge of the work. Keffer testifies in substance that he asked Goding how long it would take to get the excavation completed, and told him that it would make quite a difference in the bid, and says that he explained to Goding that the work would be a lot cheaper if started early in the summer than if it was held over another year. The witness also says that Goding said it looked as if this was quite reasonable and it (the clearing of the site) would be done by July 1, 1919.

After this meeting took place the plaintiff submitted its bid, and when the bids were opened there seems to have been some difficulty about their acceptance on account of the estimate being beyond the requirement. The plaintiff, M. H. McCloskey, jr., saw Mr. Goding and, together with him, went to examine the site, but on account of snow on the ground the plaintiff was not able to determine the extent of the excavation. The plaintiff testifies that he asked Goding " when they were going to be out of there," meaning we conclude, when the excavation upon the site was to be finished. McCloskey says that Goding answered, " You

can figure on getting on there on July first," and that he (McCloskey) said, "There isn't any question about that, is there, and he [Goding] assured me there was none." If this testimony is to be accepted, it follows that the contract subsequently executed was made in reliance upon the agreement to clear the site by July first.

Shortly afterwards the contract was executed; McCloskey returned to West Point about the fifth or sixth of May, and had a conversation with Goding and Col. Timberlake, who, it seems, had succeeded Goding as the Government superintendent of the work and who executed the contract on behalf of the defendant; and plaintiff testifies that he again asked Timberlake whether he would be ready by July first "so that we can start this job without any interruption," and that Timberlake said, "positively."

Four other witnesses testify to conversations after the execution of the contract with Goding and Timberlake, in which the representatives of the Government gave assurances that the site would be cleared by July first. It is not probable that these statements would have been made if the contract with reference to the clearance of the site had not been made as alleged by the plaintiff. This testimony therefore, tends to corroborate the testimony of Keffer and McCloskey.

There is other evidence that tends to corroborate the plaintiff on this point. The construction contract required the contractor to furnish "a schedule of progress of construction giving dates of completion of various classes of work." If, as claimed by the defendant, there was no understanding as to when the site should be cleared, it is obvious that no schedule of progress could be furnished, but the evidence shows that such a schedule was requested before the work was begun.

In our opinion the testimony of the witnesses for the defendant is not sufficient to overcome this evidence; in fact, Goding makes only a qualified denial of the testimony of Keffer and McCloskey, and what he does say is only after repeated questions by counsel for the defendant. His testimony is not consistent with the testimony given on behalf

of the plaintiff, but we think the latter is, under all the circumstances, much more worthy of credit.

It is hardly conceivable that an experienced contractor like the plaintiff would enter into a contract of this nature without having a definite understanding as to when he could begin the work. It is quite obvious, as Keffer stated in his testimony, that the work could be done cheaper in the summer than it could be done in the winter. Moreover, there were all kinds of contingencies that might affect the contractor in his performance of the work if it was indefinitely postponed. All of these matters are set out in the findings of fact which are supported by the preponderance of the evidence. There is much conflict in the evidence also as to the facts stated in Finding IX, which is in effect that the site could and should have been completely cleared and ready by July 1st, 1919. The evidence on this point is quite voluminous, but the preponderance is clearly in favor of the plaintiff.

Six witnesses gave testimony which, if correct, could only justify the conclusion that the site could, with the exercise of reasonable diligence and modern methods, have been cleared in from thirty to sixty days from the date of the execution of the contract; and the testimony of Timberlake, instead of rebutting this testimony, tends to confirm it when taken in connection with the evidence as to the amount of work done from March 31 to May 1, 1919. The witnesses who testified on behalf of plaintiff were all experienced in blasting work, and several of them had done a large amount of work in cities, where the difficulties to be encountered were at least as great as at the site in question. So far as one inexperienced in such work can acquire knowledge from photographs, the photographs taken of the progress of the work tend to sustain the contentions of the plaintiff. We see no good reason why the site could not have been cleared by July 1, 1919, if experienced parties with sufficient help had taken charge of the work.

Counsel for defendant call attention to delays on the part of the plaintiff in furnishing some of the structural iron work, artificial stone, and other materials, but it was useless

for the plaintiff to arrange to have the material on the ground before it could be used; in fact, to do so would simply have further encumbered the work. To state the situation briefly, one delay was the cause of another, and so on all through the work. Subcontractors abandoned their contracts, freight embargoes were encountered, and material became difficult to obtain. The original delay in failing to have the site ready was the primary cause of all.

It is urged on behalf of defendant that parol evidence to establish a contract or understanding with reference to time when the site was to be cleared is inadmissible. The general rule is that the terms of a written contract can not be varied by prior negotiations and understandings which are considered to have been merged in the written instrument. But this rule, like many others, has some exceptions. In 22 Corpus Juris, p. 1253, sec. 1665, it is said:

"The rule admitting parol evidence of a collateral agreement is especially applicable where such agreement constituted a part of the consideration of the written agreement, or operated as an inducement for entering into it, * * *."

This rule seems to us particularly applicable in the case at bar. Strictly speaking, the parol agreement upon which plaintiff bases its case was a distinct agreement from the written contract, although collateral thereto. It does not vary any of the terms of the written agreement, although in one sense it may be said to enlarge them. The written contract provided that the work was to "commence" when the site was completely cleared and completed within ten months after the work was begun. If the contract was plain and unambiguous as to the time when the site was to be cleared or the time when the work was to be begun, parol evidence could not be received to contradict it, but such is not the case, and we believe parol evidence to be competent to show the inducement to the contract, for certainly the statements made to McCloskey were an inducement to the contract. It may be difficult to find a decision in the reported cases setting forth conditions that exactly coincide with those in the case at bar, but numerous cases can easily be found that support the principle invoked. So, also, when the parol evi-

dence does not conflict with the terms of the contract, it is held by numerous authorities that it may be received to show the intention of the parties. In this case, if the testimony on behalf of plaintiff is to be credited, as we have found it should, the intention of the parties can only be made clear by extrinsic evidence. In this way alone can a just interpretation be given to the contract.

It should be said further that in any event the defendant was bound to have the site cleared within a reasonable time. It failed to do this and for its failure must be held responsible. We are of the opinion that the early part of July, 1919, was a reasonable time.

There were other delays to the damage of plaintiff which were caused by defendant in that it failed to comply with the provisions of the contract and specifications with reference to the manner in which the excavations should be made and the foundations prepared. These delays also added to the expense in both work and material and what was more serious, caused still other delays. It is obvious that the defendant is liable for the damage thereby incurred.

It is insisted that the plaintiff could not go on with the contract when it found that defendant would not prepare the site within the time agreed upon and thereafter bring suit for damages, but we know of no such rule. It may be that plaintiff could have elected to cancel or abandon the contract, but it also had the right to perform its part of the contract and claim damages for the defendant's failure on its part, provided, of course, there was no acquiescence in this failure on the part of the plaintiff, and the evidence shows abundantly that this did not occur.

Crook Co. v. *United States*, 59 C. Cls. 593, is cited as supporting the contention of the defendant on this point. Some of the language in the opinion, as quoted in the brief of counsel for defendant, standing by itself, might justify such an inference, but when the case was appealed to the Supreme Court (270 U. S. 4) neither this language nor anything with the same meaning is repeated in the opinion. The case was affirmed, but it was on the ground of peculiar provisions in the contract. This court and the Supreme Court have

repeatedly held that a contractor may recover the damages he has incurred by reason of delay wrongfully caused by the Government. See *Crook Co.* v. *United States*, 59 C. Cls. 348; *Goldstone* v. *United States*, 61 C. Cls. 401, and cases cited.

The evidence on the whole may be summed up by saying that the agents acting for the Government paid no attention to the verbal contract to have the site cleared on July 1, 1919, and were careless as to the performance of the provisions of the written contract with reference to how the site should be cleared.

Having found that the defendant was responsible for the delay in clearing the site and the failure to clear in the manner required by the contract, it becomes necessary to determine the amount that plaintiff was damaged thereby.

The evidence is extremely voluminous, and it is impossible to set out the details as to each item of damage within the reasonable length of an opinion. The testimony has been gone over with great care with respect to every detail thereof, both by the commissioner who heard it and by the court upon the original record. The evidence shows that if the site had been properly cleared at the time agreed upon, the contract could have been completed within the estimates placed on the several branches thereof by the plaintiff at the time the bid was made. This was proved in many cases by the actual offers of subcontractors who in some instances made a bid of an amount less than that fixed by plaintiff in the estimates. The damage or loss to the plaintiff was what he was compelled to pay over and above the cost and expense which would have been incurred had he been able to commence and proceed with the work in regular order upon a site prepared in the manner specified in the contract, and ready at the date agreed upon. The total amount to be recovered by plaintiff will include not only the extra amount paid for work and material, but also the amount deducted from the contract price by defendant in making payment on account of damages for delay; the amount of the judgment obtained against plaintiff by the Special Service Flooring Corporation for delay caused by

Syllabus

reason of the failure to furnish heat which the defendant had agreed to supply; the additional premium on the bond; additional payment for liability insurance; the additional amount paid for overhead and superintendents; and the cost of the overseer furnished by the bonding company, which by its contract with that company the plantiff was obliged to pay; but the plaintiff will not be allowed anything for profit which it might have made as that sum was included in the contract price which, under the judgment to be rendered herein, it will receive together with the damages caused by delay. The amended petition asks judgment for $330,-604.05. We find that the plaintiff is entitled to recover $230,829.18, of which $140,000 is for the use of the surety company.

In accordance with the foregoing opinion the motion of the plaintiff for a new trial is sustained, the findings of fact heretofore made are set aside, and the opinion rendered thereon withdrawn. An order to that effect will be entered, and judgment rendered in accordance with this opinion.

MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

JULIAN DE COURT v. THE UNITED STATES

[No. E-159. Decided June 18, 1928]

On the Proofs

Army pay; retirement as captain, Philippine Scouts; promotion to major, retired list.—Under the act of June 30, 1922, 42 Stat. 721, plaintiff, retired as a captain, Philippine Scouts, October 31, 1918, was promoted to the grade of major on the retired list effective January 1, 1923. He was never at any time prior to his retirement a captain in the Regular Army, by reason thereof could not have been a major in the Philippine Scouts, and was not entitled, prior to January 1, 1923, to the retired pay of a major notwithstanding length of active service. The act of June 10, 1922, granted him the retired pay of a captain, which he duly received from and after cessation of active duty on the retired list July 1, 1922, up to the date of his promotion to a majority, and this he was entitled to retain.

The Reporter's statement of the case:

Messrs. George A. King and *Cornelius H. Bull* for the plaintiff. *King & King* were on the brief.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Julian De Court, enlisted May 2, 1898, in the Seventy-first Regiment New York Infantry Volunteers, in the service of the United States in the war with Spain and was honorably mustered out November 15, 1898; enlisted in Company F, Thirteenth Infantry, Regular Army, April 17, 1899, and served therein in the successive grades of private, corporal, sergeant, and first sergeant until honorably discharged as an enlisted man October 19, 1901, to accept a commission as first lieutenant, Philippine Scouts, United States Army. He was commissioned as such first lieutenant, Philippine Scouts, and accepted the same October 20, 1901; was promoted to captain, Philippine Scouts, August 21, 1908, and accepted the appointment September 19, 1908; was retired as captain, Philippine Scouts, October 31, 1918; accepted appointment as major, Motor Transport Corps, United States Army, emergency forces, November 2, 1918, and was honorably discharged as an emergency officer November 2, 1919.

Plaintiff was on active duty in the Motor Transport Corps, at the General Depot, Baltimore, Md., from November 3, 1919, to September 16, 1920. He was on active duty as recruiting officer at Baltimore, Md., from September 17, 1920, to February 28, 1921; served as assistant professor military science and tactics at Pennsylvania College, Gettysburg, Pa., from June 15, 1921, to August 31, 1921, and as assistant professor of military science and tactics at Howard University, Washington, D. C., from December 28, 1921, to July 1, 1922. All such duty after retirement was regularly performed under orders from the War Department detailing him thereto.

The amount of active duty as a retired officer performed by Major De Court prior to July 1, 1920, was sufficient to

entitle him to promotion to the grade of major at such time as the promotion could legally be accomplished.

Plaintiff was promoted as major on the retired list of the Regular Army January 1, 1923.

II. If paid as a major for the periods below mentioned, plaintiff would have received the following differences in pay and allowances:

Pay, Mar. 1, 1921, to June 14, 1921, inclusive	$351.00
Pay, June 15, 1921, to Aug. 31, 1921	160.44
Commutation of quarters, same period	30.40
Commutation heat and light for the same period	.89
Pay, Sept. 1, 1921, to Dec. 27, 1921	394.87
Pay, Dec. 28, 1921, to July 1, 1922	388.18
Commutation of quarters to June 30, 1922	73.20
Commutation heat and light to June 30, 1922	19.36
Rental allowance July 1, 1922	.67
Pay, July 2, 1922, to Dec. 31, 1922	238.67
Total	1,657.68

The court decided that neither plaintiff nor defendant was entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

Plaintiff was retired as a captain, Philippine Scouts, October 31, 1918. He was promoted to the rank of major on the retired list January 1, 1923. After his retirement plaintiff performed a certain amount of active duty, and he now contends that counting this active duty, he would have attained the grade of major by July 1, 1920, and that he is therefore entitled to the pay of major from that date under the act of June 4, 1920, 41 Stat. 786.

The acts creating the organization known as the Philippine Scouts provided that a major should be selected from the captains in the Regular Army. Plaintiff was never at any time prior to his retirement a captain in the Regular Army. Before his retirement he became a captain in the Philippine Scouts by virtue of the act of May 16, 1908, 35 Stat. 163. The act of June 10, 1922, section 17, 42 Stat. 632, provided: "That officers and former officers of the Philippine Scouts who were placed on the retired list prior to June

4, 1920, shall be entitled to promotion on the retired list for active duty heretofore performed subsequent to retirement in accordance with the provisions of section 127a of the act of June 3, 1916, as amended by the act of June 4, 1920, and to the same pay and benefits received by other officers of the Army of like grade and length of service on the retired list." Section 127a, referred to, provided that "any retired officer who has been or shall be detailed on active duty shall receive the rank, pay, and allowances of the grade, not above that of colonel, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed to active duty since his retirement." The act of June 4, 1920, also provided for a promotion list in the Philippine Scouts, but it did not create a majority, or in any event a majority to which plaintiff would have been eligible. As appears from the record, the act of June 30, 1922, is the first act which authorized promotion in the Philippine Scouts to any rank higher than captain, independently of previous rank in the Regular Army, and this act, in so far as this case is concerned, was effective only on and after January 1, 1923, on which date plaintiff was promoted to the rank of major. The provision limiting the pay seems never to have been changed until the act of June 10, 1922, was passed granting Philippine Scout officers, retired prior to June 4, 1920, the right to promotion with corresponding pay. Having been retired as a captain he was after July 1, 1922, and until January 1, 1923, entitled to the retired pay of a captain, which he received. The petition alleges "Had claimant remained on the active list for a period of time equal to the period of active service performed by him since retirement he would have been entitled in due course of promotion to the rank of major prior to July 1, 1920." The commissioner made a finding, to which neither party excepted, as follows: "The amount of active duty as a retired officer performed by Major De Court prior to July 1, 1920, was sufficient to entitle him to promotion to the grade of major at such time as the promotion could legally be accomplished." It is, how-

ever, the opinion of the court that plaintiff's promotion to the rank of major, Philippine Scouts, could not legally have been accomplished at any time during the period contended for by plaintiff.

It is contended by defendant that during the period from July 2, 1922, to January 1, 1923, plaintiff should have received the pay of a second lieutenant instead of a captain, the difference amounting to $365.46, and that in the event it should be determined that plaintiff was not entitled to promotion prior to January 1, 1923, the Government should recover that sum. The court has reached the conclusion that neither plaintiff nor defendant is entitled to recover herein, and it is so adjudged and ordered.

GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

EDWARD P. LUPFER AND FREDERICK N. REMICK, A COPARTNERSHIP DOING BUSINESS AS LUPFER & REMICK, v. THE UNITED STATES[1]

[No. F-344. Decided June 18, 1928]

On the Proofs

Excise tax; sale of reimported automobile trucks.—The tax imposed by section 900 of the revenue act of 1921, is applicable to the sale of secondhand automobile trucks of domestic manufacture reimported into the United States, and notwithstanding an excise tax has been paid on the original sale by the manufacturer.

The Reporter's statement of the case:

Mr. George V. Triplett, jr., for the plaintiff. *Mr. J. Barrett Carter* was on the brief.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiffs during the period from June, 1922, to May, 1924, inclusive, sold certain automobile trucks, being of the

[1] Certiorari denied.

makes known as Pierce-Arrow, Packard, and Mack, to parties in the United States for the sum of $94,363.63.

II. In the month of June, 1925, the Commissioner of Internal Revenue assessed against plaintiffs, pursuant to section 900 of the revenue act of 1921, 42 Stat. 291, excise taxes on account of the sale of said trucks amounting to $2,830.91, and in addition thereto penalties and interest in the sum of $1,915.15, making a total of $4,746.06.

III. The trucks so sold by plaintiffs had been manufactured in America, taken to France, and imported from France after use in the late war. On the Mack trucks an excise tax was paid on the original sale by the manufacturer pursuant to the revenue act of 1921, but there is no evidence that any tax had been paid on the other trucks prior to their shipment to France.

IV. The plaintiffs on September 26, 1925, paid the United States $2,830.91, being the amount of tax assessed, and also paid the sum of $428.00 in settlement of the penalties and interest thereon, which payments were accepted and approved.

V. On December 18, 1925, plaintiffs filed a claim for refund of the tax, alleging that the assessment was erroneous and illegal, inasmuch as the trucks were secondhand and not new and were of American manufacture, and also because on many of said trucks the tax under section 900 had previously been paid by the manufacturer. Refund was also claimed for the amount of the interest and penalties. On February 20, 1926, this claim was denied and rejected in full.

The court decided that plaintiffs were not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Section 900 of the revenue act of 1921, 42 Stat. 291, imposed an excise tax upon the sale of automobile trucks by the manufacturer, producer, or importer thereof. There is no question but that the plaintiffs imported the trucks upon which the tax was assessed and sold them within the United States, and the question in the case is whether they thereby became liable for the tax required by this section.

Syllabus

The argument of plaintiffs is that the tax on sales by an importer applies only to articles of foreign manufacture and not to reimported articles of domestic manufacture; also that the law contemplated a single transaction and a single assessment of the tax and that the payment of more than one tax on any truck was not required. It is further argued on behalf of plaintiffs that as the trucks in question were all secondhand, they were not taxable under the Treasury rulings.

There is nothing in the act to justify such a construction. Its terms are clear and unmistakable and fix the liability of plaintiffs for the tax. It is quite probable that Congress did not foresee that some of the automobiles shipped abroad for the World War would be brought back to this country and resold, but, if so, this would not justify us in putting a construction on the act that would virtually amount to rewriting it. The law provided that the tax should be paid on the sale of trucks by an importer thereof and this court has no right to engraft exceptions upon it. The tax was properly assessed under the law and plaintiffs' petition must be dismissed. It is so ordered.

MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

SHERBURN M. MERRILL, PARKER W. WHITTEMORE, AND JOHN C. SPRING, ADMINISTRATORS OF THE ESTATE OF EMMA J. SINCLAIR, DECEASED, v. THE UNITED STATES

[No. F-384. Decided June 18, 1928]

On the Proofs

Federal estate-transfer tax; deduction of State inheritance tax.—The inheritance tax of the State of Massachusetts, paid by the administrators of an estate, is a charge against the estate within the meaning of section 203 (a) (1) of the revenue act of 1916, and as such deductible from the value of the gross estate in ascertaining the Federal estate-transfer tax.

The Reporter's statement of the case:

Messrs. Lowndes C. Connally and *Frank S. Bright* for the plaintiffs. *Mr. H. T. Newcomb* was on the brief.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiffs are citizens and residents of the United States and are the duly appointed and qualified administrators of the estate of Emma J. Sinclair, deceased.

II. Emma J. Sinclair, a citizen of the United States and a resident of the Commonwealth of Massachusetts, died on February 19, 1918, intestate.

III. Letters of administration were duly issued by the Probate Court of Essex County, Massachusetts, on March 18, 1918, to plaintiffs as administrators of the estate of said decedent. Plaintiffs have not been discharged from their trust as administrators and said appointment is still in full force and effect.

IV. Pursuant to the revenue act approved September 8, 1916, plaintiffs, as administrators of said estate, on or about February 18, 1919, filed with the collector of internal revenue at Boston, Massachusetts, a Federal estate-tax return for said estate showing a net estate, for the purpose of the Federal estate tax, of $1,020,782.67, and a tax of $84,493.92, which tax was paid by plaintiffs as administrators to the said collector on August 14, 1919.

V. Upon a subsequent review and audit of said return, the Commissioner of Internal Revenue increased said net estate to $1,070,150.84 and assessed an additional tax of $5,924.06, which tax was paid to said collector of internal revenue on January 27, 1921.

VI. On March 27, 1918, plaintiffs, as said administrators, paid to the proper officers of the Commonwealth of Massachusetts the sum of $32,998.31 out of said estate as an inheritance tax under the provisions of section 20 of chapter 563 of the act of the year 1907 and all acts amendatory thereof.

Reporter's Statement of the Case

VII. Neither the net estate returned by said administrators nor the net estate as finally determined by said commissioner was computed by deducting from the gross estate the said sum of $32,998.31 or any part thereof paid by said plaintiffs as inheritance taxes under the laws of the Commonwealth of Massachusetts.

VIII. On April 10, 1924, plaintiffs, as said administrators, duly filed with said collector a claim for refund of $5,924.06, Federal estate tax, based upon the contentions (1) that the said sum of $32,998.31 paid by said administrators to the Commonwealth of Massachusetts as inheritance taxes imposed by the laws of that Commonwealth on said estate, was a proper deduction from the gross estate of said decedent for the purposes of the Federal estate tax and should have been deducted in computing the net estate for tax and in computing the resultant tax and (2) that the sum of $114.11 paid by said administrators as a Federal income tax on the income of said decedent prior to her death was a proper deduction.

IX. On December 12, 1924, said commissioner rejected said claim for refund as to the contention that the sum of $32,998.31, inheritance tax paid the Commonwealth of Massachusetts, was a proper deduction but allowed said claim in the sum of $13.69, resulting from the concession by said commissioner that the said amount paid as income tax was a proper deduction from the gross estate and should have been deducted. Plaintiffs have not accepted from defendant said sum of $13.69 nor any part thereof.

X. Should it be determined that the said sum of $32,-998.31, Massachusetts inheritance tax, is a proper deduction from the gross estate, the correct tax due from said estate after allowing the deduction of $114.11 income tax heretofore conceded by the commissioner would be $86,444.81 instead of $90,417.98 heretofore paid by plaintiff, and plaintiffs would be entitled to recover the sum of $3,959.89, together with interest at the rate of six per cent per annum on said sum from January 27, 1921.

The court decided that plaintiffs were entitled to recover $3,959.89, with interest from January 27, 1921, to date of judgment.

MOSS, *Judge*, delivered the opinion of the court:

Plaintiffs are suing for the recovery of the sum of $3,-959.89 alleged to be an overpayment of the estate tax of Emma J. Sinclair, deceased, on account of the failure of the Commissioner of Internal Revenue to deduct from the gross estate the amount of inheritance taxes paid to the Commonwealth of Massachusetts.

The question involved is governed by the provisions of section 203 (a) (1) of the revenue act of 1916, 39 Stat. 778, which reads as follows:

"That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered."

It is contended by the Government that the Massachusetts inheritance tax is imposed upon the privilege of the legatee or distributee to receive property, and that it is therefore not a charge against the estate within the meaning of the statute. The prime question is not whether the tax under discussion is a tax upon the right to transmit property or upon the right to receive property. It is simply whether or not this tax is such a charge as falls within the term "such other charges against the estate, as are allowed by the laws of the jurisdiction under which the estate is being administered." Section 1 of the Massachusetts act provides

that "administrators, executors and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests shall accrue by survivorship, shall be liable for such taxes until same have been paid; * * *." It is further provided by section 4 that such taxes "shall be payable to the Treasurer and Receiver General by the executors, administrators or trustees, * * *." All property subject to such taxes was, by the terms of the statute, charged with a lien to secure the payment of same. In the present case the administrators were notified by the proper officer of the Commonwealth of Massachusetts that the tax "became due and payable by *you* to the Treasurer and Receiver General * * *," and the administrators paid said tax out of the property of the estate before distribution. Decisions of the Supreme Court of Massachusetts are cited by both plaintiffs and defendant in support of their respective contentions. Plaintiffs call attention to the decision in the case of *Hollis* v. *Treasurer and Receiver General*, 242 Mass. 163, in which the court referred to the inheritance taxes as "a pecuniary burden laid for the support of the Government upon the privilege of *transmitting* or *receiving* property by will or by intestate succession." (Italics ours.) In *Pratt* v. *Dean*, 246 Mass. 300, it is said, "The tax is imposed not upon the property, but upon the right to receive property, by reason of the death of the testator or donor. It is not a property tax but an excise tax upon the transmission of property." In the case of *Bingham* v. *Commissioner of Corporations and Taxation*, 249 Mass. 79, the court used this language: "The Commonwealth received by way of succession and legacy taxes under G. L. c. 65, *a contribution from the estate of the decedent* * * *." (Italics ours.) It appears from the decisions cited that the Massachusetts courts have consistently held that the inheritance tax is a tax both upon the right to transmit propery and upon the right to receive property. The decision in the District Court of Massachusetts, in the case of *Thayer* v. *Malley*, 3 Fed. (2d) 194, in which was involved the identical question presented here sustains plaintiffs' contention. The following language of

the court seems especially worthy of emphasis: "It would, I think, be a decidedly unjust result to hold that under this Federal statute, the State tax was deductible in one State and not deductible in another, upon a subtle legalism, without practical value. The broader view seems to me the sounder one, viz, that such taxes as in fact have to be paid to the State upon the succession, are to be deducted before the Federal tax is assessed, and come within the language of the act as 'other charges against the estate * * * allowed by the laws of the jurisdiction under which the estate is being administered.' * * *." The attention of the court is called to the fact that the decision in the case of *New York Trust Co.* v. *Eisner*, 256 U. S. 345, overruled the *Thayer* v. *Malley case* on that point, but it should also be noted that the later case of *Keith* v. *Johnson*, 271 U. S. 1, in turn reversed the ruling in the *Eisner case* on the same point. In the case of *Keith* v. *Johnson*, which involved the question of the deductibility of the New York inheritance tax from the gross income of the estate for Federal income-tax purposes, the court held that the inheritance tax was deductible, citing with approval *United States* v. *Woodward*, 256 U. S. 632. In *United States* v. *Mitchell*, 271 U. S. 9, decided on the same day, the court confirmed the right of the executor to deduct the Texas inheritance tax from the gross income of the estate, holding that the Texas law was similar to that of New York. In this connection it should be observed that the New York inheritance tax law in its essential provisions is identical with the Massachusetts statutes and it was so declared in the *Thayer-Malley case.*

Section 703 (a) (4) of the recent revenue act of 1928 provides that "in determining the net income of an heir, devisee, legatee, distributee, or beneficiary * * * or of an estate, for any taxable year, under the revenue act of 1926, or any prior revenue act, the amount of estate, inheritance, legacy, or succession taxes paid or accrued within such taxable year shall be allowed as a deduction * * *." While this act deals explicitly with the question of the deductibility of the classes of tax named therein for Federal

income-tax purposes, the Government has seemed to recognize that where an inheritance tax is deductible from the gross income of the estate for income-tax purposes, it is also a proper deduction from the value of the gross estate for estate-tax purposes. However that may be, the court has reached the conclusion, upon a full consideration of the case, that the inheritance tax paid by the administrators herein to the Commonwealth of Massachusetts was a charge against the estate within the meaning of the taxing statute, and should have been deducted from the value of the gross estate. Plaintiffs are entitled to judgment, and it is so adjudged and ordered.

GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

JUSTIN C. BURNS AND CHARLES F. LYNCH, RECEIVERS OF THE HOOPES & TOWNSEND CORPORATION, v. THE UNITED STATES

[No. H-92. Decided June 18, 1928]

On the Proofs

Cancellation of contract; act of July 1, 1922; contract entered into prior to act; recovery of lost profits.—Loss of profits constitutes a proper element of damage in the cancellation of a contract. A contract that was entered into prior to passage of the act of July 1, 1922, which authorized the President to cancel the same, is not affected by the act as to the basis of compensation for cancellation, and the contractor is entitled to profits lost by reason of the cancellation.

The Reporter's statement of the case:

Messrs. George R. Shields and *George A. King* for the plaintiffs. *Mr. P. H. Granger* and *King & King* were on the briefs.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

Reporter's Statement of the Case

I. The Hoopes & Townsend Company, a corporation organized under the laws of the State of Pennsylvania with its office and place of business in the city of Philadelphia of said State, was on April 8, 1924, merged into, changed its name to, and was thereafter known as Hoopes & Brother, Inc., likewise a corporation under the laws of the State of Pennsylvania, with office and place of business as aforesaid.

II. On April 30, 1924, Hoopes & Brother, Incorporated, sold and transferred its property and assets, except certain real estate, to a corporation organized under the laws of the State of Delaware known as Hoopes & Townsend Steel Company, which in turn on May 8, 1925, transferred its assets to another Delaware corporation known as the Hoopes & Townsend Corporation.

III. On September 26, 1925, Justin C. Burns and Charles F. Lynch were appointed by the United States District Court for the Eastern District of Pennsylvania as ancillary receivers of all the property and assets of the Hoopes & Townsend Corporation.

IV. On May 17, 1921, the Hoopes & Townsend Company entered into a contract with the United States, represented in that behalf by T. W. Leutze, Acting Paymaster General of the Navy, for the manufacture and delivery of 186,000 pounds of rivets to be delivered as therein provided at a price of $25,110. A copy of said contract is annexed to the petition as Exhibit C, and by reference made a part hereof.

V. While the contract mentioned in the preceding paragraph was in course of performance Congress, on July 1, 1922, 42 Stat. 814, enacted a law providing for the scrapping of a number of vessels under construction and authorized the President to cancel or modify contracts made for materials intended for use in the construction of such vessels. The contract aforesaid was for rivets designed for use in the construction of certain of the vessels to be scrapped. In anticipation of the passage of this act the United States on July 20, 1921, directed that further deliveries under the contract be postponed for one year and on November 3, 1921, a supplemental agreement was entered into by which

the parties agreed to such postponement on terms therein provided. A copy of this supplemental agreement is annexed to the petition herein as Exhibit D and by reference is made a part hereof. Thereafter, to wit, on April 4, 1923, in further pursuance of the act of July 1, 1922, aforesaid, the contract of May 17, 1921, was canceled, the rivets already manufactured to be taken and paid for at the contract rate and claim for the losses due to cancellation to be submitted by the contractor. A copy of the letter of cancellation dated April 4, 1923, is annexed to the petition herein as Exhibit E and is by reference made a part hereof.

VI. The contractor thereafter delivered and was paid for the rivets that had been manufactured and held in storage amounting to 31,820 pounds and presented its claim for losses and work on materials in process and other accounts due to the cancellation aforesaid. On August 6, 1923, the Navy Department made an award or allowance of $4,350.34 and the contractor, declining to accept this as the amount properly due it, was thereafter paid 75 per centum of the amount awarded, amounting to $3,262.76.

VII. The award or allowance approved by the Navy Department was a correct statement of the actual carrying charges on the net value of the work in process from date work was suspended to date contract was canceled and of the reasonable storage charges on materials in process for the same period, but included no allowance for loss of possible profits, disruption of other work, or damages from cancellation.

VIII. Had plaintiff been permitted to complete the work in its entirety, it would have received and been paid at the rate of 13½ cents per pound for the total contract quantity of rivets, 186,000 pounds. The rivets could and would have been manufactured and produced at a cost of 7¼ cents per pound, or at a net profit of 6¼ cents per pound, or an actual profit of $11,625.00. The cancellation of the contract in advance of completion deprived the contractor of a profit of 6¼ cents per pound on the total undelivered poundage of 154,180 pounds, or $9,636.25, which sum would have been

earned and received over and above what was received, except for the cancellation aforesaid.

The court decided that plaintiffs were entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

On May 17, 1921, the Hoopes & Townsend Company entered into a contract with the United States for the manufacture and delivery of 186,000 pounds of rivets, for which it was to receive $25,110. This contract was canceled by the Government on April 4, 1923.

While the contract was in course of performance Congress, on July 1, 1922, enacted a law providing for the scrapping of a number of vessels then under construction, and authorized the President to cancel or modify contracts for materials intended for use in the construction of such vessels. 42 Stat. 814. The contract under consideration was for rivets designed for use in the construction of certain of the vessels which were to be scrapped. In anticipation of the passage of the act of July, 1922, the defendant on July 20, 1921, directed that further deliveries under the contract be postponed for the period of one year, and on November 3, 1921, a supplemental agreement was entered into, by which the parties agreed to such postponement on terms therein provided. The contract continued suspended for a period of eight months beyond the year. On April 4, 1923, it was canceled. All matters between the company and the Government arising from the suspension of the contract, between the date of such suspension and the date of cancellation, were settled. On a claim presented by the company for loss and damages due to the cancellation of the contract the Navy Department, on August 6, 1923, made an award of $4,350.34. Declining to accept the award the company was paid 75 per cent of same, or $3,262.76. No complaint as to the award is made by plaintiffs, except for the failure of the Navy Department to allow for loss of profits, which it is alleged would have amounted to $9,602.63. This action is for the recovery of that sum, and also for the balance on the award, $1,087.58.

Opinion of the Court

The contract was canceled by the Government under the authority of the act of July 1, 1922, 42 Stat. 814, which contains the provision " That whenever any such contract is canceled or modified, settlement of claims arising therefrom shall be made by the President upon a fair and equitable basis as he may determine, out of any funds hereafter to be appropriated for that purpose."

Defendant cited in its brief the case of *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, and advanced the argument that inasmuch as the contract in this case was made while the act of June 15, 1917, 40 Stat. 182, was in force, the ruling in that case to the effect that the parties entered into the contract with the prospect of its cancellation, and that the possible loss of profits must have been within the contemplation of the parties, is applicable in the instant case. But the act of June 15, 1917, was not in force at the time the contract was made. It was repealed by the act of June 5, 1920, nearly a year before the contract in this case was entered into. The repeal was subject to certain limitations set forth in the repealing statute, but those limitations do not relate to the point on which defendant depends. The principle announced in the *Russell Motor Car case* is not applicable here.

The authority of the President under the act of July 1, 1922, to cancel the contract is conceded. It is, however, the contention of plaintiffs that " The act did not and could not fix a *basis for compensation*, in conflict with settled rules of law, of the damages entailed by the cancellation of contracts made prior to the passage of the act." Plaintiffs are correct in this contention. When the Government exercised its authority under the act of 1922 and canceled plaintiffs' contract, it incurred the liabilities attaching by law for such an act. Plaintiffs' rights under the contract may not be abridged by an attempt of Congress to determine what shall be the rule of compensation in the event of a cancellation of same. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312. It is a well established principle, which needs no discussion, that loss of profits constitutes a proper element of damage in the breach or cancellation of a contract. *United States* v. *Behan*, 110 U. S. 338.

The evidence shows without contradiction that by the cancellation of the contract in advance of completion the contractor was deprived of a profit of 6¼ cents per pound on 154,180 pounds of undelivered rivets, or $9,636.25. The amount sued for is $9,602.63, and plaintiffs are entitled to recover same, together with the sum of $1,087.58, balance on the award. It is so adjudged and ordered.

The judgment in this case disposes of *Hoopes & Townsend* v. *United States*, F-30.

GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

PERFECT WINDOW REGULATOR CO. v. THE UNITED STATES

[No. D-980. Decided June 18, 1928]

On the Proofs

Income and excess-profits tax deductions; depreciations; value of patent.—Depreciation of the value of patents acquired by plaintiff, one of them being a reissue under sec. 4916, R. S., determined and found to be not greater than that allowed by the Commissioner of Internal Revenue in his assessment of income and excess-profits taxes for the year 1917.

The Reporter's statement of the case:

Messrs. William F. Unger and *Stanley H. Fuld* for the plaintiff. *Gilman & Unger* were on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation organized and existing under the laws of the State of Maine.

II. By assignment dated February 27, 1911, the plaintiff acquired from Alexander Konta letters patent of the United States, No. 948603, bearing date of February 8, 1910, and letters patent of the Dominion of Canada, No. 125727, bearing date of May 17, 1910. As consideration, the com-

pany transferred to Mr. Konta common stock of the par value of $99,500 and preferred stock of the par value of $30,000 and $5,000 in cash.

Mr. Konta thereupon transferred to the company the above referred to patents, together with common stock of a par value of $12,500, together with his check for $12,000. If a par value for the stock is assumed, the transaction represents an equivalent cash consideration for the patents of $110,000.

There is no satisfactory evidence of the fair market value of the stock at the time of this transaction.

III. The patents referred to in Finding II were acquired by Alexander Konta in 1911, he having paid for them $7,000 in cash and preferred stock of the newly organized company of a par value of $15,000. The assignment to Mr. Konta was dated January 27, 1911, although the transaction was negotiated and practically completed in 1910.

IV. In 1918 plaintiff filed its return of income for income and excess-profits tax purposes for the year 1917. In this return plaintiff claimed as deduction for depreciation on the patents for the year $12,300, which represented $\frac{1}{10}$ of the purchase value of the patents stated to be $123,000 in stock.

V. On this return the Commissioner of Internal Revenue allowed as depreciation for the patents $7,687.50, which is $\frac{1}{16}$ of the claimed purchase value of $123,000.

On the return the Commissioner of Internal Revenue assessed an income and excess-profits tax in a total amount of $37,676.30, which amount has been paid by plaintiff.

VI. On September 15, 1911, plaintiff tendered for surrender United States Patent 948603 to the Commissioner of Patents, with a petition that the same might be reissued. The accompanying oath stated that the patent was inoperative, the language in part being as follows:

"* * * for the reason that the specification thereof is defective and that such defect consists particularly in the omission to express that the utility of the invention is not confined to carriage windows, the arrangement being essentially a window-operating apparatus or device having a range of utility beyond the application to carriage win-

dows, and further in expressing or implying that the invention is confined to devices in which the window is moved by means of a chain gear, and further generally in omitting to claim the invention commensurate wth the scope thereof; * * *."

VII. On July 28, 1914, the Commissioner of Patents granted Reissue Patent No. 13780 on the above petition, with claims broader in scope than those of the original patent.

This reissue patent contains twelve claims, the first two of which are directed to details of a lock structure for the rotatable controlling handle.

The remaining claims are directed to details of a structure which accomplishes a transverse movement of the window over the weather rail after raising.

VIII. Plantiff manufactures three types of window regulators, referred to as types C, D, and F in plaintiff's catalog, Exhibit 4, which is by reference made a part of this finding, with the exception of page 5 not in evidence.

The descriptive matter relative to these types states:

"The regulator is manipulated by means of a handle in conjunction with a locking mechanism, whereby the first movement given the handle to raise or lower the window automatically unlocks the window, and a further movement in the same direction automatically couples the window to the operating mechanism."

There is no satisfactory evidence as to the nature of this locking structure or whether claims 1 and 2 of the Reissue Patent 13780 are readable thereon. Of the three types mentioned only type D embodies a transverse movement of the window subsequent to raising.

IX. British patent to Altricher 4996 of 1901 was cited by the Patent Office as a reference during the prosecution of the above-mentioned reissue application. This British patent, received in the United States Patent Office April 16, 1902, discloses a window regulator comprising two revolving chain wheels connected by means of an endless chain so that the window can be either entirely lowered or fixed at any height or closed. The structure disclosed involves an automatic transverse movement of the window to lift the same over the fillet of the window ledge, and also involves and dis-

closes an automatic locking action incorporated with the small sprocket whereby the first movement against the handle to raise or lower the window automatically unlocks the window, and a further movement in the same direction automatically operates the window lowering or raising mechanism.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The present case is a tax case and the question at issue is the depreciation of patent rights for the year 1917. Plaintiff purchased United States Patent No. 948603 and Canadian Patent No. 125727 on February 27, 1911.

In computing the excess-profits and income-tax return for the year 1917 plaintiff depreciated its patents in the sum of $12,300, which was one-tenth of the sum stated to have been paid for them, which sum was stated to be $123,000 in cash and stock. Actually it appears that the consideration given for the patents represented an equivalent cash consideration of $110,000, assuming a par value for the stock given. This is purely an assumption, however, as there is no satisfactory evidence of the fair market value of the stock at the time of this transaction. (See Finding II.)

On the tax return, the Commissioner of Internal Revenue allowed as depreciation for the patent $7,687.50, which is $\frac{1}{16}$ of the claimed purchase value of $123,000, the patent having sixteen years to run after its acquisition by plaintiff. This resulted in a tax of a total amount of $37,676.30, which amount plaintiff paid under protest. This tax was assessed under regulation 62, article 167, which provides as follows:

"In computing a depreciation allowance in the case of a patent * * * the capital sum to be replaced as the cost * * * of the patent * * * or its fair market value as of March 1, 1913, if acquired prior thereto. The allowance should be computed by an apportionment of the cost of the patent or copyright or of its fair market value as of March 1, 1913, over the life of the patent or copyright since its grant, or since its acquisition by the taxpayer, or since March 1, 1913, as the case may be."

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Plaintiff now contends that the fair market value of the patents on March 1, 1913, was $300,512, basing this valuation upon a capitalization of the net annual earnings and the future earnings, capitalizing the future earnings at 6 per cent. Plaintiff contends that with this value taken in relation to the life of the patents subsequent to March 1, 1913, to wit, fourteen years, that the depreciation allowed for that year should have been $21,465.14 instead of $7,687.50 allowed by the tax commissioner. Plaintiff claims a refund of $9,286.75 due him by virtue of the $300,512 value of the patents on March 1, 1913. There has been no evidence presented as to the value of the Canadian patent alone, and without proper evidence as to exports to Canada, etc., it is difficult to perceive wherein this patent would be of value to an American manufacturer. Canadian patent laws have a working requirement, and unless the patent has been worked in Canada the same would become forfeited within a certain period of time after its issue. The statute relative to the computation of depreciation for patents is perfectly clear in its use by the Commissioner of Internal Revenue in arriving at the figure of $7,687.50, as the patent had sixteen years to run after its acquisition by plaintiff.

The plaintiff is in error in assuming that the fair market value of the patents on March 1, 1913, was $300,512, for the following reasons:

(*a*) The original U. S. Patent 948603 had been tendered to the Commissioner of Patents for surrender and the reissue of this patent petitioned for on the ground that the patent was inoperative, this being in the sense that the invention had not been claimed commensurate with the scope thereof.

The reissue patent was not granted until July 28, 1914, and therefore the only patent owned by plaintiff as of March 1, 1913, was the original U. S. Patent 948603, which plaintiff had tendered for surrender, with the statement that it was inoperative. In this connection note Revised Statutes 4916, the significant portion of which is as follows:

"Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason

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of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee, or, in the case of his death or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. Such surrender shall take effect upon the issue of the amended patent, * * * but no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid."

We believe that such defective or inoperative patent even if worth $123,000 at the time of its purchase in 1911 would certainly not be worth this amount on March 1, 1913.

Plaintiff also attempted to prove by means of expert witnesses that the reissue patent was several times more valuable than the patent in its original form. This is based on the relative scope of the claims and is purely a matter of opinion. The more proper way of viewing this is that the statutes upon which the reissue of patents is based preclude the introduction of any new matter into the patent, and the invention claimed in the reissue patent can not be any broader than the invention disclosed in the original patent.

(*b*) The patent rights owned by plaintiff are not basic in character, there being in existence in this country as a publication British Patent 4996 of 1901 which discloses a window regulator of the same basic type as that of the reissue patent and having functions similar to the reissue patent in that it provides for automatic locking and transverse movement of the window to lift the same over the weather rail. As this British patent was cited during the

Syllabus

prosecution of the reissue application and the claims of the reissue therefore had to be phrased to avoid the disclosure of the British patent, it stands to reason that the structure disclosed in the British patent could be employed in this country without infringing the claims of the reissue patent, and hence the reissue was not at all basic in character.

In addition, plaintiff makes three types of window regulators and only one of these types, to wit, type D, embodies the transverse movement of the window, to which structure ten of the twelve claims of the reissue patent are directed.

It is clear that in the present instance the usual case exists in which the patent rights represent but one of a number of more or less intangible assets, such as good will, quantity products with consequent low price, etc., upon which a successful business may be built and carried on.

For these reasons the court concludes that the depreciation of $7,687.50 allowed by the Commissioner of Internal Revenue is ample. It follows that the petition must be dismissed. It is so ordered.

GREEN, *Judge;* and MOSS, *Judge*, concur.

NELS S. NYBERG, AS ADMINISTRATOR OF THE ESTATE OF PETER BERGMAN, v. THE UNITED STATES[1]

[No. H-441. Decided June 18, 1928]

On the Proofs

Federal estate-transfer tax; interest of intestate's widow, State of Nebraska.—Under the statutes of the State of Nebraska the real property of an intestate, if the personal property be not sufficient therefor, may be sold for the payment of family allowance, debts, funeral charges, and expenses of administration, the residue, if any, of the personal property being distributed to designated beneficiaries and of the real property descending thereto in the same proportions, the widow receiving an interest as in lieu of dower. *Held*, That the widow's

[1] Certiorari denied.

interest is not vested before the intestate's death, upon the intestate's death is transferred to her, and is subject to the Federal estate-transfer tax, imposed by section 402 of the revenue act of 1921, as a part of decedent's gross estate.

The Reporter's statement of the case:

Mr. Marvin Farrington for the plaintiff. *Mr. Harry Faber White* and *Mills & Mills* were on the brief.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Peter Bergman, being a citizen of the United States and a resident of the State of Nebraska, died intestate at Polk, in Polk County, Nebraska, on February 5, 1925, without issue, but leaving surviving him a widow, Mary Bergman, and certain other collateral kindred who, under the laws of intestacy of the State of Nebraska, inherited that portion of the decedent's estate which did not pass to the widow.

II. On March 9, 1923, letters of administration were duly issued to Nels S. Nyberg, the plaintiff herein, by the County Court of Polk County, Nebraska.

III. On February 2, 1924, the plaintiff, as such administrator, made and filed a return for Federal estate tax on Form 706.

IV. On August 21, 1924, upon audit and review of said return, the Commissioner of Internal Revenue determined the value of the gross estate to be $549,157.16, the value of the net estate $472,022.04, and the total tax $14,821.32, making an additional tax of $129.02.

V. Plaintiff paid to the United States collector of internal revenue for the district of Nebraska Federal estate taxes on account of the estate of said Peter Bergman, deceased, as follows: On February 21, 1924, $14,692.30 and on December 29, 1924, $129.02.

VI. On December 15, 1926, the plaintiff filed with said collector of internal revenue his claim for refund of $9,781.68.

VII. On March 26, 1927, the Commissioner of Internal Revenue allowed said claim for refund in the sum of $110.98 and rejected same for the sum of $9,670.70. Plaintiff was notified of such action by letter dated March 26, 1927. Plaintiff has not accepted said refund.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

Peter Bergman died intestate and without issue in the State of Nebraska, leaving surviving him a widow, Mary Bergman, and certain collateral kindred. His estate consisted of both real and personal property. Letters of administration were issued to plaintiff, Nels S. Nyberg, who in due time filed an estate-tax return, which included the value of all property, real and personal, left by the decedent, and paid the tax shown to be due, $14,692.30. Upon audit and review the Commissioner of Internal Revenue determined the gross value of the estate to be $549,157.16, the net estate $472,022.04, and the total tax $14,821.32, making an additional tax of $129.03, which was paid by plaintiff. On December 15, 1926, plaintiff filed a claim for refund based on the grounds, (1) that the value of the interest of the widow, and (2) the value of the homestead should not have been included in the gross estate. The commissioner rejected the first contention and allowed the second in the sum of $110.98. The question for determination is whether or not the value of the interest of the widow, Mary Bergman, in her husband's estate should be included in his gross estate for estate-tax purposes. The question involved is controlled by sections 402 and 403 of the revenue act of 1921, 42 Stat. 278, the applicable portions of which are as follows:

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(*a*) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the ex-

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penses of its administration and is subject to distribution as part of his estate;

"(*b*) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy; * * *."

Section 403 of the revenue act of 1921 provides, in part as follows:

"That for the purpose of the tax the value of the net estate shall be determined—

"(*a*) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property, * * *, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes; * * *."

Dower and curtesy in the State of Nebraska were abolished by statute. In lieu thereof the Nebraska statute on the subject, section 1220 of the Compiled Statutes of Nebraska, in making provision for the descent of real property when the husband or wife survive, provides that subject to his or her debts, and the right of homestead, such property shall descend "one-half to the husband or wife, if there be no children nor the issue of any deceased child or children, surviving." It is the contention of plaintiff that the "interest" of the widow in the property of the decedent existing at the time of the decedent's death was in the nature of a vested estate, or, as described in plaintiff's brief, a vested ownership, according to the laws of the State of Nebraska, and that such property did not come to her through the death of her husband either by inheritance or as a distributive share in his estate, and that the effect of the inclusion of such an interest in the gross estate of the decedent is to

authorize a direct tax, and is, therefore, an unconstitutional exercise of the taxing powers of the Government. We are unable to agree with this contention.

The "interest" of the widow, Mary Bergman, in the real property of her husband, was an interest created by statute in lieu of dower. Under section 1220 of the Nebraska statute, real estate of which the deceased is seized at the time of his death passes by descent, subject to his or her debts. Upon the decease of the husband, if his personal property is not sufficient for the payment of the family allowance, debts, funeral charges, and expenses of administration, any part, or all, of the real estate may be sold and the proceeds applied to those purposes. If there is a residue, and only in that event, the statute provides that it "shall descend" to designated beneficiaries. It is at no time during the life of the husband a vested estate or a vested ownership. It will be seen at once that this interest does not have the certainty of the right of dower of which the wife may not be deprived, except by her own express consent. Section 402 (a), above quoted, mentions three conditions for determining the character of the property, the value of which should be included in the gross estate, (1) that it be subject to the payment of the debts of the decedent; (2) that it be subject to the payment of administration expenses; (3) that it be subject to distribution. The property under discussion was subject to each of these conditions. Under section 1222 of the Nebraska Statutes, which deals with the distribution of personal property, it is provided in the sixth clause thereof, "The residue, if any, of the personal estate *shall be distributed* in the same proportions to the same persons as prescribed for the *descent* of real estate." (Our italics.) The property in question passed to the widow as a distributee. Under the Nebraska statute, the "interest" of Mary Bergman was a mere right to inherit. The tax under consideration is not a tax on property. It is an excise tax imposed on the *transfer* of the "*net estate*" of the decedent. In arriving at the "net estate" for the purpose of computing the tax, Congress deemed it proper to include in the gross estate the value

Opinion of the Court

of *all property, real or personal, tangible or intangible,* including in specific terms *any interest* of the surviving spouse in any of said property, and, resorting again to specific terms, "as dower, curtesy, or *by virtue of a statute creating an estate in lieu of dower or curtesy.*" The constitutionality of this statute is well established in a long line of cases, in which the general principles which must control the decision in this case, have been considered. See *New York Trust Co.* v. *Eisner,* 256 U. S. 345; *Edwards* v. *Slocum,* 264 U. S. 61; *United States* v. *Robbins,* 269 U. S. 315. Numerous other cases might be cited.

Plaintiff depends chiefly on *Frick* v. *Lewellyn,* 298 Fed. 803; *Munroe* v. *United States,* 10 Fed. (2d) 230, *Strahan* v. *Wayne,* 93 Neb. 828, 142 N. W. 678. In the *Frick case* it was sought to impose the estate tax upon life insurance taken out by the decedent payable to his wife and daughter. The value of these policies, in excess of $40,000, under a provision of the statute now being considered had been included in the gross estate. The court properly held that the right of the beneficiaries did not spring from the death of the testator, but arose from the contracts of insurance, and that the provision in question was, in effect, the levying of a direct tax, and was therefore unconstitutional. The distinction between that case and the instant case is too obvious to require discussion. The decision in the *Munroe case* supports plaintiff's contention that the tax under consideration is a direct tax. This decision is, however, contrary to the principles announced by the United States Supreme Court in the decisions above cited, and in others not enumerated. It is stated in plaintiff's brief that the writ of error in this case was dismissed on motion of the Solicitor General. It is explained in defendant's brief that the Government inadvertently prosecuted a direct appeal to the United States Supreme Court, when the case should have been appealed to the Circuit Court of Appeals, and for this reason the appeal had to be dismissed. In the *Strahan case* the court construed the Nebraska inheritance tax law and held that the interest of a surviving spouse is not taxable under that law. While it announced certain rules as to the

nature of the right of a surviving spouse, no question was involved as to the authority of Congress to include in the gross estate the value of an interest which is distributed to the surviving spouse out of the estate of the deceased. If, however, this decision could properly be construed as sustaining plaintiff's contention, it is, like the *Munroe case*, out of harmony with the ruling of the United States Supreme Court, and has no binding force on this court.

For the reasons hereinabove set forth, the court is of the opinion that the interest of the widow, Mary Bergman, in the estate of her deceased husband, Peter Bergman, was properly included in the gross estate of said decedent. The petition will be dismissed, and it is so adjudged and ordered.

BOOTH, *Chief Justice*, concurs.

GRAHAM, *Judge*, took no part in the decision of this case.

GREEN, *Judge*, concurring:

The contention on behalf of plaintiff concisely stated is that in Nebraska the wife is the owner in common with her husband of the property which but for her marriage would be his alone, and his death merely extinguishes his right in the portion thereof which is then set apart to her. It is therefore insisted that her distributive share is not covered by the Federal estate tax, and if it is, the tax to that extent is a direct tax, and is unconstitutional and void. In support of this claim of ownership in the wife which is repeatedly made in the argument on behalf of plaintiff, a decision of the Nebraska court is cited which is claimed to be controlling and binding upon this court.

That the Federal courts are not always bound by the construction of a State statute made by the Supreme Court of the State in which such statute was enacted would seem to follow from the decision in the case of *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110. Conceding, however, as I think we should, that a rule of property announced by a State court in construing a statute of its State must be followed by the Federal court in such a case as the one at bar, there still remains much more to be considered. It

is sometimes difficult to determine what the State courts have actually held, for the reason that the language of the opinion considered may not be clear, or it may appear that implications drawn from it appear to be in conflict with other decisions of the same court and the law as universally accepted in the State where the opinion is rendered. Even when a conclusion is reached as to what the State court has held, it becomes necessary to consider whether it has any application to the case which is under consideration by the Federal court.

Such is the situation with reference to the decision of the Nebraska Supreme Court in the case of the *Estate of Strahan*, 93 Neb. 828, upon which plaintiff's case is based and which the United States District Court for the District of Nebraska cited as an authority in the case of *Munroe* v. *United States*, 10 Fed. (2d) 230, a case which was not reviewed by the Supreme Court for the reason that counsel for the Government mistook the remedy.

The report of the *Strahan case* discloses a very peculiar record. The question in the case to be determined by the Nebraska court was whether the statutes of that State imposed an inheritance tax on the distributive share which the widow received out of the estate of her husband upon his death. What is sometimes referred to as the majority opinion of the court held that her share was not subject to such a tax, reversing the lower court. Another judge dissented entirely; a third did not sit; a fourth judge (Sedgwick) concurred in the result but construed the Nebraska statute and said that, "Under this act * * * the surviving spouse 'succeeds' to the rights which the statute gives in the property that was held in the name of the decedent," basing this statement upon the title of the act which was, "An act to provide for succession to the estates of decedents and to repeal [sections named]." If this be a correct construction of the Nebraska law, it would seem to need no argument to show that the decision does not support plaintiff's case; although in the same opinion it is held, concurring with what is called the majority opinion, that the inheritance tax law of Nebraska does not apply to the widow's interest. The

remaining judge dissented expressly from the majority opinion in so far as it held that personal property of the estate was not subject to an inheritance tax and dissented also with the argument made in the concurring opinion that the inheritance tax should not apply to property acquired by succession. His opinion also states (referring to Nebraska statutes):

"The inheritance tax law makes all property taxable 'which shall pass by will or by the intestate laws of this State.' The succession law of 1907 is indubitably 'the intestate law of this State.' In fact, it is now the only intestate law there is in this State, and is clearly included within the terms of the taxing statute."

No opinion was expressed by him as to the effect of the statute on real estate other than as contained in the quotation above set forth. It is obvious that the opinion last referred to is an authority for the application of the Federal tax instead of against it.

All that can be ascertained from the conflicting opinions in this case is that two judges concurred in holding that the Nebraska inheritance law did not apply to the widow's distributive share. As this conclusion was reached from the application of different and inconsistent principles, I am unable to understand how it can be said that the Supreme Court of Nebraska has laid down a rule of property which must be followed in the case at bar; and if it did, I would ask from which opinion the rule is taken, and what the rule is.

An examination of the *Strahan case* shows that in none of these conflicting opinions is it held that the ownership of the property distributed to the widow existed in her prior to the death of her husband. On the contrary, in both the State and Federal cases from Nebraska which are relied upon by plaintiff her right is spoken of as "inchoate." In other words, she had nothing but an expectancy. Some reliance has been placed on a statement in what is called the majority opinion that the "effect of the Nebraska decedent law" is practically the same as that where community property prevails. This may be true so far as exemptions from State

inheritance taxes are concerned. So also it is said in the same opinion that the interest of the wife is similar to that of a "silent partner." Similar it may be in some respects, but as the Nebraska courts have held and still hold that the husband is not a mere agent or partner, these loose expressions ought not to be interpreted as meaning that the husband is either an agent for, or a partner of, his wife in regard to the property which may subsequently be distributed to her by reason of his death.

In the concurring opinion by Judge Sedgwick it is also said, "The policy of our law, as developed by legislation from time to time, has been more and more to place husband and wife upon an equality as to their property, and to regard each as interested in the property held in the name of either." But this is far from saying that actual ownership existed as it does in the case where property is held in common. In fact, the same opinion says that "Under this act the husband and wife are placed upon an exact equality as to the rights of each in the *property of the other*" (italics mine), which is equivalent to saying that property allotted the wife was not hers, but was owned by her husband up to his death. This construction accords with the words of the Nebraska statute, which as recited therein applies to "real estate of which the deceased is *seized* at the time of his death" (italics mine), and also says that such property "shall descend" to designated beneficiaries, and provides for the distribution of the personal property. That the husband can not deprive the wife of her interest by will is immaterial. This is true as to the dower right which the Nebraska statute abolished and which is still prevalent in many States, and this dower like the rights conferred by the Nebraska statute, is transmitted by operation of law and not by any act of the decedent. Further on in this opinion the effect of the transfer of the husband's property at his death by "operation of law" will be considered. Enough has, I think, been presented to show that the *Strahan case* does not support plaintiff's contention. A later case is cited by counsel for plaintiff as affirming the *Strahan case*, but an examination of the opinion therein shows that the subject

in controversy in the case is quite different, and nothing contained in the decision has any application to the case at bar.

Counsel for plaintiff call attention to the fact that the Federal tax is upon the transfer of the net estate, and it is argued that this requires a transfer by the decedent in order that the tax may be applicable, and that as the distributive share of the widow came to her by operation of law it is not covered by the Federal tax. This argument appears to me to be based upon an entire misconception of the Federal estate tax and the principles upon which it is based, an error which runs all through the argument of plaintiff.

In considering this question it ought to be kept in mind that the Federal tax is not a tax upon the property although it is often spoken of as such for the reason that the tax is paid out of the estate. In *Knowlton* v. *Moore*, 178 U. S. 41, it is said:

"Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

The court also quotes from Hanson's Death Duties the following:

"What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death."

Further on in the same case it is also stated that the act of 1864 added a duty on the passing of real estate, so that a system prevailed by which there was a probate duty charged upon the whole estate, a legacy duty upon legacies or distributive shares, and a succession duty charged against each interest in real property. All through this case inheritance and succession duties as to real property are treated as being on the same footing and all of the taxes referred to above are spoken of as being valid and constitutional.

Conceding for the purposes of the argument that the widow in Nebraska does not take her distributive share by virtue of inheritance but simply by operation of law, there can be no question but that the Federal law applies to the estate which she received.

Concurring opinion by Judge Green

It is true that the Federal law levies a tax "upon the **transfer of the net estate,**" but there can be no claim that there was not a transfer when the widow received her share. The "net estate" is ascertained by taking what is included in the "gross estate" and then deducting certain exemptions and allowances. In fact, the words "net estate" used in the Federal statute have a special meaning very different from their ordinary use and are often misunderstood by those not skilled in law. It is not the net value of the estate that the decedent owned, but a sum made up by subtracting from the "gross estate" these exemptions and allowances. The "gross estate" likewise has a special meaning given it by the act and it includes any interest acquired by the surviving spouse existing "at the time of the decedent's death * * * by virtue of a statute creating an estate in lieu of dower or curtesy." The statute expressly says:

"The term 'net estate' means the net estate as determined under the provisions of section 403."

Section 403 provides that the value of the net estate shall be determined as stated above.

While the statute imposes a tax only upon the "transfer of the net estate" it should be observed that it does not require that the transfer should be made by the decedent. The transfer referred to is unmistakably the "transfer or receipt of the property as the result of death." This clearly appears from the language of the statute in specifying the items which make up the gross estate. No reference therein is made to a transfer by the decedent except in one separate paragraph applying to a particular condition.

If the rule was, as contended on behalf of plaintiff, that the Federal tax does not apply to property which was not transferred by the husband and passed by operation of law, it would lead to some very absurd results. In fact, it would be easy to avoid the Federal tax entirely by making no will, in which event all of the property would pass by "operation of law." The part received by the children or parents in the estate of the decedent as well as that of collateral heirs would all be determined by the law of the domicile of

the decedent and a tax upon the estate would be futile. Such a principle carries its own refutation.

Congress in framing the estate tax had other decisions which sustained it.

In *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 348, *Knowlton* v. *Moore*, *supra*, is affirmed and it is said, quoting in part from that case, that it "treated the 'power to transmit or the transmission or receipt of property by death' as all standing on the same footing." In this decision the practical and historical grounds of this tax were alluded to, doubtless for the reason that they had prevailed for more than a hundred years, and it is said that "upon this point a page of history is worth a volume of logic."

Surely a "transfer" is included in a "transmission." That there was a transmission of the property does not seem to me to admit of discussion. The husband's ownership—and I think it clear that he did have an ownership of the property subsequently apportioned to his wife—ceased by death and was transmitted or transferred to his wife.

Frick v. *Lewellyn*, 298 Fed. 803, is cited by plaintiff's attorneys as authority for their contention, but in my view it has no application to the case now under consideration.

In the *Frick case* no property of the decedent passed by reason of his death. His death merely matured a contract for the payment of money—not to his estate but to certain beneficiaries. The only connection which his death had with the matter was to fix the date at which the insurance policies in question matured and the time at which they were payable.

It seems to me clear that the Federal inheritance tax was especially intended and written to cover such cases as the one at bar and to meet and avoid the objections made to the tax in the argument on behalf of plaintiff.

There remains only the question arising upon the constitutionality of the tax with respect to its admeasurement. Here again the argument for its unconstitutionality is based upon a misconstruction of the Federal statute. In *New York Trust Co.* v. *Eisner*, *supra*, it is said "For if the tax attaches

Syllabus

to the estate before distribution—if it is a tax on the right to transmit, *or on the transmission at its beginning*, obviously it attaches to the whole estate except so far as the statute sets a limit." (Italics mine.) The whole estate was transferred upon the death of the husband, part of it distributed by operation of law, but what is there in this that should exclude this part from taxation or prevent its being included with the rest of the estate in admeasuring the tax? The value of all the property transferred or of any part thereof bears a reasonable relation to the admeasurement of the tax. The fact that the widow may have had some interest therein which under the Nebraska statute she was liable to lose by death or by judicial sale might be a reason for reducing the tax if Congress saw fit, but does not prevent this value from being used for the purpose of admeasuring the tax. If the tax was upon the property, the rule would be different, but it still remains an excise, not upon the property but upon its transmission, and every principle that sustains the estate tax in any respect sustains this application of it.

SECOND NATIONAL BANK OF SAGINAW, SAGINAW, MICHIGAN, TRUSTEE OF THE ESTATE OF WELLINGTON R. BURT, DECEASED, v. THE UNITED STATES

[No. J–188. Decided June 18, 1928]

On Demurrer to Petition

Res adjudicata; lack of authority to move dismissal; subsequent suit.—A dismissal by this court on motion of plaintiff and upon a showing that all matters involved in suit had been fully settled by the parties thereto is res adjudicata as to the claim sued on, the judgment is not invalidated by reason of lack of authority on the part of plaintiff to make the settlement or to move dismissal, and a demurrer on the ground of res adjudicata, interposed in a second suit covering the same subject matter, must be sustained. (See 62 C. Cls. 785.)

Opinion of the Court

The Reporter's statement of the case:

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.
Mr. Theodore B. Benson, opposed.

The averments of the petition are set forth in the opinion.

GREEN, *Judge*, delivered the opinion of the court:

The petition recites among other things that on March 2, 1919, Wellington R. Burt, a citizen of the United States and a resident of the State of Michigan, died, leaving a will, a copy of which is attached to the petition. On August 13, 1920, the Probate Court for the County of Saginaw, State of Michigan, appointed the plaintiff executor of said will. The plaintiff qualified and served as executor until May 24, 1922, when the said court approved its account as executor and pursuant to the will appointed plaintiff as testamentary trustee of the assets of the estate. The plaintiff qualified as such trustee and has since acted as such, and is the owner of the claim presented.

The petition further recites in substance that a controversy arose between the plaintiff and the United States Commissioner of Internal Revenue as to the amount of Federal estate taxes due the United States, and that after certain proceedings had been had between the trustee and the commissioner by which taxes were assessed and a portion thereof refunded, the plaintiff, as trustee, on November 20, 1925, brought suit in the Court of Claims asking a refund therein of $510,768.02, which cause was docketed as E–584, and issue was joined on this petition by a general denial entered by the Attorney General.

The petition further states that pending this suit and on June 26, 1926, the plaintiff and the said commissioner, with the approval of the Secretary of the Treasury, entered into an agreement entitled "Agreement as to final determination and assessment of tax," whereby it was determined that the amount of tax due was $2,940,568.28, and this determination was accepted by the taxpayer. This

agreement resulted in a further refund to the plaintiff by the commissioner on July 15, 1926, of $249,220.14.

The petition further recites that thereafter, on July 21, 1926, counsel for plaintiff in the said cause, E–584, in this court, filed a motion to dismiss that suit, showing that the claim for refund sued upon had been reopened by the commissioner, allowed in part, and the amount of the allowance paid to plaintiff, and the parties had entered into an agreement by virtue of section 1106 (b) of the 1926 revenue act consenting to the final determination and assessment of the estate tax, whereupon this court entered an order dismissing said cause as of October 18, 1926, and the said cause was accordingly dismissed.

Plaintiff further avers in the petition that by virtue of paragraph 22 of the will of the decedent it was to act as testamentary trustee and to make yearly reports to the decedent's son as to the condition of the estate; that no such report was made to the son as to the agreement entered into between plaintiff and the commissioner; and that the son had no knowledge of the agreement or of the motion to dismiss the case.

The petition also avers that on June 4, 1927, plaintiff filed a claim for refund in the sum of $256,888.61, which was rejected by the commissioner on the ground that the previous agreement above set forth had settled all questions between the parties.

The petition further avers that on November 23, 1927, plaintiff filed a petition in the Probate Court of Saginaw County, Michigan, asking judgment of that court as to whether or not the said "Agreement as to final determination and assessment of tax" dated June 26, 1926, should be ratified.

The petition further shows that on November 25, 1927, the said probate court ruled that all the taxes assessed and collected on gifts made by the decedent to his children were illegal and that the refund of the said $249,220.14 paid plaintiff as described above was just and valid and formed no consideration for the said agreement and no consideration for the surrender of plaintiff's claim for further refund.

The petition further recites that the said agreement of June 26, 1926, was made and entered into by the trustee without power or authority having first been obtained from the probate court and that its action has never been ratified or confirmed by that court, and in its said order, among other things, the court decreed:

"* * * that the action of petitioner in beginning said suit in the United States Court of Claims be, and the same is hereby, ratified and confirmed, but not its action in discontinuing said suit."

Plaintiff further alleges that the commissioner included in the gross estate of the decedent certain corporate stocks and bonds which the decedent had transferred by absolute gift to his children prior to the enactment of the revenue act of 1918, and which transfers were not made in contemplation of death; also that the commissioner included a cement plant which had been conveyed by the decedent to his son December 31, 1914; and that the wrongful inclusion of the value of this property in the gross estate increased the amount of taxes $256,888.61, for which sum the plaintiff asks judgment.

It will be observed that the instant case is not the first which the plaintiff has begun in this court to recover the amount to which it claims it is entitled as a refund. The former case was dismissed on October 18, 1926, by the court on motion of the plaintiff itself, and upon a showing that all matters involved in the suit had been fully settled by the parties thereto. The plaintiff now contends that it had no authority to make this motion or the settlement upon which it was based. Indeed, it is also claimed that the plaintiff had no authority to commence the action in which judgment was rendered.

There may be some question as to whether in Michigan a trustee under a will, even though he has full power to take charge of the assets in the estate, is authorized to commence a suit which would determine the amount of estate taxes for which the trust estate was liable. But however that may be, there is no question about the authority in this respect now, for if plaintiff had none at the time it commenced the suit, the Probate Court of Saginaw County, Michigan, has by

order and decree ratified its action in this respect. Having authority to commence the case through its duly appointed attorneys and the Government having appeared and filed its answer to its petition, this court unquestionably had jurisdiction over the parties and the subject matter of the case. In what the court did subsequently it might have erred, but its judgment must stand until set aside or modified by some direct proceedings. Until this is done the judgment stands of full force and effect.

But the plaintiff has not in any way attempted to set aside or modify the original judgment by any direct proceedings. No motion has been filed to set that judgment aside. The argument that it is of no effect is based on the contention that the plaintiff had no authority to enter into any such settlement or to file a motion to dismiss the case. Conceding for the sake of the argument, and for that purpose only, that plaintiff did not have such authority, it would only show that the court erred in entering the judgment without having before it some evidence of the plaintiff's authority so to act. But this does not affect the validity of the judgment. It dismissed the plaintiff's case upon the merits and the claim now set up in the case at bar is *res adjudicata.*

The views above set forth make it unnecessary for this court to consider whether the plaintiff, in its capacity of trustee in charge of the estate, had authority to commence the former suit in this court without directions from the Probate Court of Michigan; whether in any event the plaintiff can hold the money refunded to it through the settlement of the former case and ignore the judgment therein by commencing this new suit; and other matters that have been suggested as meriting serious consideration.

The demurrer must be sustained and the petition dismissed. It is so ordered.

MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

UNITED PROFIT-SHARING CORPORATION v. THE UNITED STATES

[No. E-480. Decided June 18, 1928]

On the Proofs

Income and excess-profits taxes; expense of advertising; capital expenditures; erroneous method of bookkeeping.—Expenses for advertising, necessary to the procurement of income-producing contracts, are capital expenditures. An erroneous method of bookkeeping, whereby such expenditures were charged to current expenses, does not preclude the taxpayer from obtaining refund of income and excess-profits taxes by calculating them on an amortization over the life of the contracts so procured.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Messrs. Robert H. Montgomery* and *J. Marvin Haynes* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff was organized under the laws of Delaware in July, 1914, to engage in the business of selling redeemable coupons and certificates to nationally known concerns, to be distributed with sales of their products. The United Cigar Stores Company had given similar coupons with merchandise sold at its stores from the time of its organization in 1902, and the device had been found to be an excellent advertising medium. The plaintiff was organized by officers of the United Cigar Stores Co., in order to make the coupons available to other companies.

II. The stock of the plaintiff was offered to stockholders of the United Cigar Stores Co., and was subscribed for in cash in the amount of $327,890. The capital was paid in for the specific purpose of giving the plaintiff funds to be used for soliciting contracts, opening premium stations, and conducting a national advertising campaign to establish its

business. Later it was found necessary to increase the paid-in capital to $1,638,150, and to use part of plaintiff's capital in order to meet the advertising and development expenses.

III. The officers of the plaintiff at once undertook to induce manufacturers of nationally known products, such as William Wrigley, jr., and Swift & Co., to enter into contracts for the use of its coupons. These manufacturers demanded that the plaintiff agree to conduct advertising campaigns and to solicit other manufacturers, in order to acquaint the public generally with the use of the coupons. The plaintiff accordingly agreed to conduct and did conduct such a campaign consisting of newspaper, periodical, and billboard advertising. To aid in procuring contracts the company in 1914 and 1915 opened premium stations in the larger cities throughout the country at heavy expense. The purpose of these stations was to advertise the coupon, and to familiarize the public with the fact that it was given with other articles than United Cigar Stores Company products. The company did not intend these stations to be permanent but intended to discontinue them as soon as the advertising period was over. In fact, all but one or two of them were closed in from one to three years. It also distributed several millions of catalogs and circulars by mail and by house-to-house canvassers. It conducted prize contests for school children, who would bring in the largest number of coupons, and distributed redeemable coupons free. In order to procure contracts with retailers in Pittsburgh and New York plaintiff employed scores of canvassers and ran daily advertisements in the newspapers. It employed high-salaried men who had had experience in a similar line of business for the purpose of procuring contracts, and kept them only until the business had been launched.

IV. These advertising campaigns continued from the latter part of 1914 until about July, 1916. At that time the company had solicited the larger manufacturers in the country and had procured as many contracts as its officers believed it could obtain. It had also spent as much money in advertising as its officers felt it could afford.

V. The plaintiff spent the following sums in order to procure contracts for the purchase of its coupons, which contracts produced its income in the years 1914–1919:

1914	$96, 651. 75
1915	537, 131. 87
1916	96, 661. 52
	730, 445. 14

The amounts so expended were not ordinary and necessary expenses of the plaintiff but were capital expenditures procuring contracts.

VI. The contracts procured during 1914 to 1916 as a result of the above-stated campaign expenditures produced for the plaintiff during their lives $8,727,276.83. The largest contract—that with William Wrigley, Jr., & Co.—produced alone $6,489,678.16 and had a life of ten years. The average life of all the contracts secured in 1914 to 1916, weighted by the returns or receipts from them, was 6.94 years.

VII. After the advertising campaign was discontinued in 1916 very little was spent in advertising. The premium stations were, with one or two exceptions, discontinued in 1916 and 1917; thereafter the coupons were redeemed through the United Cigar Stores stations. The authorized capital of the company was reduced on December 26, 1916, from $2,000,000 to $500,000, leaving an actual paid-in capital of $409,537.50. The reduction was made because more capital was unnecessary after the contracts before stated had been obtained.

VIII. Neither the president nor any officers of the company gave any specific instructions as to how the books of the company should be kept. All of the expenditures made in procuring contracts in 1914–1916 were originally charged to current expense. This was done because the bookkeeper came from the United Cigar Stores Company and adopted its system of charging off all expense items. These expenditures were, however, for the most part segregated into separate accounts, and the vouchers indicated which were in fact expenses pertaining to the procurement of contracts.

The expenditures in question could not be allocated to any particular contract since they were expended in the course of procuring many contracts. In the case of the two largest contracts, payment was made on the basis of the redemption of the coupons, which deferred for a long period of months the receipt of any income from these contracts.

IX. In order to reflect true income during any given year or years good accounting practice required in 1914–1916, as well as at the time the testimony was taken, that the foregoing expenditures should not be charged off as ordinary expenses in the years incurred, but should be deferred or capitalized and amortized over the lives of the contracts to procure which the expenditures were made.

X. In the income-tax returns which the plaintiff originally filed for the years 1914–1916 these expenditures were deducted as ordinary and necessary expenses for the years in which incurred, and no part of them was included in invested capital in the income and profits tax returns which the plaintiff originally filed for the years 1917, 1918, and 1919, nor during the latter years was any part of them deducted from the gross income of the plaintiff.

XI. In 1920 one of the officers of the plaintiff company, feeling that there was a doubt as to whether the way in which these expenditures had been treated in the income and excess-profits tax returns of the company was correct, consulted counsel, and as a result a thorough and complete examination of the books and vouchers of the company was made to ascertain whether or not these expenditures had been properly dealt with. As a result of the examination, amended income and excess-profits tax returns for the years 1914 to 1918 inclusive, and a final return for 1919, were filed, in which returns these expenditures were spread or amortized equally over a period of ten years—the life of the longest contract procured as a result of the campaigns in which the moneys were expended—and there was restored to invested capital the appropriate unexpended portion of such expenditures for each year, respectively. Plaintiff's books were adjusted to agree with the amended returns.

XII. During 1917 no new contracts were secured, and during 1918 and 1919 only a few minor contracts were se-

cured. The total receipts under the latter aggregated $56,-482.68, and all but one of them were for a term of one year, the remaining contract being for a term of five years.

XIII. On or about April 30, 1918, plaintiff filed with the collector of internal revenue for the second district of New York its corporate income-tax return from the calendar year 1917 and its excess-profits tax return for the same year. Said returns showed a tax liability of $26,854.47.

XIV. On or about June 14, 1918, plaintiff paid to said collector of internal revenue the said sum of $26,854.47.

XV. On or about September 14, 1920, plaintiff filed with said collector of internal revenue amended income and profits tax returns for the calendar year 1917, which disclosed a tax liability of $5,593.33.

XVI. On or about June 18, 1919, plaintiff filed with the collector of internal revenue for the second district of New York its income and profits tax return for the calendar year 1918. Said return showed a tax liability of $118,468.53.

XVII. Plaintiff paid the said collector of internal revenue the amount of $101,496.70, as follows:

On or about March 15, 1919	$25, 000. 00
On or about June 14, 1919	25, 751. 15
On or about September 15, 1919	25, 372. 78
On or about December 15, 1919	25, 372. 77
	101, 496. 70

XVIII. On or about December 7, 1920, plaintiff filed with said collector of internal revenue a claim in abatement in the amount of $16,977.42, representing approximately the difference between the aforesaid tax liability of $118,468.53 and the amount of $101,496.70 paid to the said collector of internal revenue.

XIX. On or about September 14, 1920, plaintiff filed with said collector of internal revenue an amended income and profits tax return for the calendar year 1918, which disclosed a tax liability of $24,521.77.

XX. On or about March 15, 1920, plaintiff filed with the collector of internal revenue for the second district of New York a tentative income and profits tax return for the calendar year 1919, which disclosed a tax liability of $182,564.40.

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XXI. On or about July 23, 1920, plaintiff filed with said collector of internal revenue, its final income and profits tax return for the calendar year 1919, which disclosed a tax liability of $114,711.07.

XXII. Plaintiff paid to the said collector of internal revenue the amount of $91,282.20 in respect of its tax liability for the year 1919 as follows:

On or about March 15, 1920	$45,641.10
On or about June 14, 1920	45,641.10
	91,282.20

XXIII. On or about July 14, 1920, plaintiff filed with said collector of internal revenue a claim for abatement in the amount of $67,853.33, being the difference between the tax liability shown by its tentative return, to wit, $182,564.40, and the tax liability shown by its final return, to wit, $114,711.07.

XXIV. On or about August 7, 1920, plaintiff filed with said collector of internal revenue, claim for credit in the amount of $23,428.87, representing the difference between the tax liability shown by its final return, to wit, $114,711.07, and the amount of $91,282.20 paid to the said collector of internal revenue.

XXV. On or about February 16, 1924, the Commissioner of Internal Revenue notified the taxpayer that its tax liability for the calendar years 1917, 1918, and 1919, respectively, was as follows:

1917	$32,686.13
1918	67,606.57
1919	127,327.75
Total	227,620.45

Based upon the taxes heretofore paid for the said years respectively, the determination of the said commissioner indicated an overpayment of taxes in the amount of $33,890.13 for the year 1918 and underpayments of taxes for the years 1917 and 1919 in the amounts of $5,831.66 and $36,045.55, respectively.

XXVI. Thereafter and on or about June 12, 1924, plaintiff paid to said collector of internal revenue the sum of

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$7,987.08 in respect of additional income and profits taxes alleged to be due for the calendar years 1917 to 1919, inclusive, together with interest in the amount of $1,177.93. Said amount of $7,987.08 was computed as follows:

	Tax originally paid by plaintiff	Tax as determined by commissioner	Additional tax paid
1917	$26,854.47	$32,686.13	$5,831.66
1918	101,496.70	67,606.57	[1] 33,890.13
1919	91,282.20	127,327.75	36,045.55
Totals	219,633.37	227,620.45	7,987.08

[1] Overpaid.

XXVII. In 1920 plaintiff filed second and amended income-tax returns for the years 1914, 1915, and 1916 in which the expenditures hereinbefore referred to were amortized over a period of ten years.

XXVIII. Prior to March 14, 1921, plaintiff filed with the collector of internal revenue a claim for refund of income and profits taxes illegally collected in the amount of $63,862.92, covering the years 1917, 1918, and 1919, based upon the amended returns as aforesaid. On or about August 18, 1925, the Commissioner of Internal Revenue rejected said claim.

XXIX. On or about April 10, 1925, plaintiff filed with said collector of internal revenue a claim for refund of taxes illegally collected in the amount of $26,756.80 in respect of the calendar year 1917. This claim was filed as an amendment to and perfection of the claim for refund filed prior to March 14, 1921, as aforesaid. On or about July 7, 1925, the Commissioner of Internal Revenue rejected said claim.

XXX. On or about April 10, 1925, plaintiff filed with the collector of internal revenue a claim for refund of taxes illegally collected in the amount of $43,379.19 relating to the calendar year 1918. This claim was filed as an amendment to and perfection of the claim for refund prior to March 14, 1921, as aforesaid. On or about July 7, 1925, the Commissioner of Internal Revenue rejected said claim.

XXXI. On or about March 14, 1925, plaintiff filed with said collector of internal revenue a claim for refund of taxes

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illegally collected in the amount of $19,604.42 relating to the calendar year 1919. This claim was filed as an amendment to and perfection of the claim for refund filed prior to March 14, 1921, as aforesaid. On or about July 7, 1925, the Commissioner of Internal Revenue rejected said claim.

XXXII. If, of the expenditures hereinbefore referred to, aggregating $730,445.14, $543,180.92 is allocated to the Wrigley contract, representing the proportion of the total expenditures which the receipts under the Wrigley contract bear to the total receipts under all contracts; if $105,885.33 is allocated to the Kaufman and Baer contract on a like basis; if the amounts so allocated are amortized over the life of the Wrigley and Kaufman and Baer contracts, respectively; if the balance of the $730,445.14 or $81,378.89 is amortized over the weighted average life of the remaining contracts; and if the unamortized portion of the said expenditures is included in invested capital, the correct tax liability of plaintiff for the years 1917, 1918, and 1919, respectively, is as follows:

1917	$4, 622. 24
1918	23, 416. 56
1919	108, 960. 17
	136, 998. 97

XXXIII. If the expenditures in question be amortized as set forth in Finding XXXII, then plaintiff paid excessive income and excess-profits taxes for the years 1917 to 1919 inclusive, and interest amounting to $91,799.41.

XXXIV. The bid and asked prices for the stock of the plaintiff company during the year 1914 were as follows (there being no quotations on account of the war between July 30 and the week of November 21):

	Bid	Asked
Week of Nov. 21, 1914	12	12¼
Week of Nov. 28, 1914	15¾	16
Week of Dec. 5, 1914	15	15½
Week of Dec. 12, 1914	15½	15¾
Week of Dec. 19, 1914	17½	17¾
Week of Dec. 26, 1914	16⅜	16⅝

XXXV. The amended returns for 1914, 1915, and 1916 show that the plaintiff by reason of including in its ordi-

nary and necessary expenses the before-mentioned expenditures rather than a portion thereof, paid less income taxes for those years, respectively, than it should have paid had it deducted only a portion of such expenditures.

If the expenditures be amortized as set forth in Finding XXXII above, the deficiencies were as follows:

	Amount paid	Amount due	Deficiency
1914	$1, 193. 85	$1, 480. 92	$287. 07
1915	1, 261. 09	5, 752. 28	4, 491. 19
1916	3, 375. 92	3, 655. 02	279. 10
	5, 830. 86	10, 888. 22	5, 057. 36

XXXVI. Plaintiff has offered, upon the record, to have deducted from any judgment to which the court may determine that it is entitled in this cause, any deficiency in the amount of income taxes paid by it for the years 1914, 1915, and 1916, respectively, which this court may decide existed by reason of the deduction in those years from its gross income of all of the before-mentioned expenditures.

The court decided that plaintiff was entitled to recover $86,742.05, with interest to date of judgment on $22,232.23 from June 14, 1918; on $1,583.44 from March 15, 1919; on $25,751.15 from June 14, 1919; on $16,855.42 from September 15, 1919; and on $24,199.24 from June 12, 1924.

MOSS, *Judge*, delivered the opinion of the court:

The plaintiff was organized in July, 1914, to engage in the business of selling redeemable coupons and certificates to widely known business concerns, for distribution by them with sales of their products. During the years 1914, 1915, and 1916 plaintiff expended large sums of money in advertising its business throughout the country for the purpose of procuring desirable contracts with large manufacturers and merchants. In its income-tax returns for 1914, 1915, and 1916 plaintiff claimed as deductions from gross income the expenses of said advertising campaign, as "ordinary and necessary expenses paid within the year in the maintenance and operation of its business and property," under the

appropriate section of the revenue act of 1913. These returns were prepared in accordance with plaintiff's books of accounting. With greatly diminished expenses plaintiff continued to claim such deductions in its tax returns for 1917 and 1918 and for its tentative return for 1919. In 1920, after having filed the return for the year 1919, and after paying part of the tax for that year, plaintiff asserted that an error had been made in its tax returns for 1914, 1915, and 1916, claiming that the large expenses incurred in those years should have been treated as capital expenditures and spread over a period of years, and contending also that only an aliquot part of such expenses should have been deducted from the gross income for 1914, 1915, and 1916 and subsequent years until the period of ten years had elapsed. Plaintiff raised the further contention that the unamortized balance of such expenses should have been treated as a part of its invested capital for excess-profits tax purposes for the years in which excess-profits taxes were imposed. Plaintiff filed amended returns, and claims for refund designed to correct the situation in accordance with those contentions, which claims were disallowed by the Commissioner of Internal Revenue. The commissioner did, however, determine that plaintiff was entitled to the relief afforded by the special assessment sections 327 and 328 of the revenue acts of 1917 and 1918 with reference to its excess-profits taxes for 1917, 1918, and 1919, which action resulted in a substantial reduction of plaintiff's tax liability for those years.

The revenue act of 1913, 38 Stat. 114–166, under the provisions of which plaintiff paid its taxes for 1914, 1915, and 1916, authorized the taxpayer to deduct " all the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and property."

The evidence discloses that the large manufacturers and retailers would not contract to buy coupons until they were assured that plaintiff company would advertise extensively in order to acquaint the public with the scheme. It was a nation-wide advertising campaign which consisted of newspaper, periodical, and billboard advertising. Premium sta-

tions were opened and maintained in the larger cities throughout the country. Catalogs and circulars were distributed by mail and by house-to-house canvass. It conducted prize contests for school children and employed the services of expert advertising agents. The essential purpose of this campaign was to demonstrate to manufacturers and retailers that the coupons of plaintiff would be a valuable means of advertising and increasing their business. This campaign continued from July, 1914, to the end of the year 1916, as the result of which plaintiff procured many large and profitable contracts. Plaintiff expended in said advertising campaign in 1914, $96,651.75; in 1915, $537,131.87; and in 1916, $96,661.52. By the end of the year 1916 plaintiff had secured contracts which produced in the succeeding years a total of $8,727,276.83. The largest, a contract with William Wrigley & Company, produced alone $6,489,678.16 and had a life of ten years. After the advertising campaign was discontinued in 1916 a very trifling amount was spent thereafter. The authorized capital stock was reduced in 1916 from $2,000,000 to $500,000 for the reason that more capital was unnecessary after said contracts had been obtained. The unusual and extraordinary purpose of the expense had been accomplished. These vast sums of money were expended for the sole purpose of procuring contracts from which plaintiff might derive profit. They were not ordinary expenses. They were, in a proper sense, capital expenditures, and should have been spread over a period of years in determining plaintiff's tax liability.

It is, however, the contention of defendant that having elected to charge these expenditures to current expense, and having filed its returns and paid its taxes on that basis, plaintiff can not now be permitted to correct its books, or its returns, so as to obtain the relief sought. In its brief, defendant practically concedes that if plaintiff has kept its books so as to reflect the correct situation with reference to these expenditures, and had made its returns accordingly, such expenditures would have been deductible as capital expenditures, and not as an ordinary expense. The plain meaning of the Government's contention is that once having

charged these expenditures to current expense plaintiff is irrevocably bound by its act in so doing, even though such charge was erroneous. A taxpayer should not be penalized for the erroneous treatment of an item affecting his tax liability, either in the matter of accounting or in his tax returns. Entries in books are not final and conclusive, and may be corrected on a showing of the true facts. In *Mitchell Bros. Co.* v. *Doyle*, 225 Fed. 437, 440, the court said, "Mere bookkeeping entries can not preclude the Government from collecting its revenues. Nor are such entries conclusive upon the taxpayer, when it is shown, as here, that they represent and indicate ancient, instead of present, actual values. The bookkeeper creates nothing. His methods, figures, and records must yield to proven and established facts." In affirming the judgment in this case (247 U. S. 179) Mr. Justice Pitney at page 187 used the following language: "Such books are no more than evidential, being neither indispensable nor conclusive. The decision must rest upon the actual facts, which in the present case are not in dispute." In appeal of *Goodell-Pratt Company*, 3 B. T. A. 30, the board thoroughly considered and disapproved the regulations under the provisions of which the commissioner disallowed plaintiff's claims. In that case the question was whether or not the taxpayer might include in invested capital for the years 1917, 1918, and 1919 the sum of $280,513.26 expended during the years 1909 to 1916, inclusive, for the development of patents, secret processes, methods of manufacture, special machinery, new tools, etc., and charged by the taxpayer to current expense, and deducted from gross income for income-tax purposes during those years. The board held that such expenses were in fact capital expenditures, and that although the taxpayer had for seven years charged them on its books to current expense, it was entitled to a readjustment of its taxes in accordance with the real facts. Again, in appeal of *Huning Mercantile Co.*, 1 B. T. A. 130, the board held, "Books of account are intended to reflect the true condition of the taxpayer's affairs and to assist the Government in ascertaining true net income

for taxation. When they do not do so they should bind neither the Government nor the taxpayer."

We are of the opinion that plaintiff is entitled to the relief sought. The remaining question is to determine what is a fair and equitable method for the amortization, or spread, of these expenditures. One hundred and eight contracts were procured as a result of the advertising campaign, and they vary in length from one to ten years. The expenditures attributable to the procuring of the contracts, as distinguished from other expenses of plaintiff's operations, are susceptible of segregation, and have been segregated. It is not possible, however, to allocate to the particular contract the expense involved in procuring such contract. The expenditures, as a whole, contributed to the procuring of all the contracts. Plaintiff has suggested three methods for the spread of these expenditures: (1) To spread the expenditures over the life of the longest contract, i. e., the Wrigley contract, which had a life of ten years; (2) to spread them over the average lives of the contracts, i. e., 6.94 years; (3) to assign to the Wrigley contract, the largest, such proportion of the total expenditures as the returns under that contract bear to the total returns; the same method to be followed with the next largest, the Kaufman-Baer contract; and to assign the balance of the expenditures to the remaining contracts, using the average life of such contracts, which is 2.22 years. It will be seen that by this method $543,180.92 is to be allocated to the Wrigley contract, and $105,885.33 to the Kaufman-Baer contract, and only the sum of $81,378.89 to the remaining contracts. It is believed that the latter method affords the best means for the fair and equitable amortization of these expenditures, and same is hereby adopted by the court as the proper guide for determining plaintiff's tax liability herein. See Finding XXXII. It is admitted by defendant, in its brief, that the computation of tax, and dates from which interest should run, are correctly set forth by plaintiff. Plaintiff is entitled to recover, and it is so adjudged and ordered.

GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

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L. W. PACKARD & CO. v. THE UNITED STATES

[No. D-850. Decided June 18, 1928]

On the Proofs

Settlement contract; mistake in release; accord and satisfaction; mutual intention.—A release is subject to explanation as to the subject matter of the accord and satisfaction, and notwithstanding a mutual release, signed upon cancellation of a contract, is inclusive in its terms, the intention of the parties to exclude therefrom an item concerning which there was no dispute, will govern.

The Reporter's statement of the case:

Mr. John P. Bramhall for the plaintiff. *Mr. James E. McCabe* was on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is now, and was during all of the times hereinafter mentioned, a corporation duly organized and existing under the laws of the State of Maine, with its principal place of business and office at Ashland, New Hampshire.

II. On May 15, 1918, plaintiff company was given a memorandum award of contract for 135,000 yards O. D. Melton 20-oz., at $3.75 per yard, delivery to be made f. o. b. cars Ashland, New Hampshire; 15,000 yards during June, 20,000 during each July, August, September, October, November, and December, 1918. A copy of said memorandum award of contract is filed with plaintiff's petition, marked "Exhibit A," and made a part of these findings by reference.

Under date of May 17, 1918, L. W. Packard, representing plaintiff company, accepted and approved said memorandum of award in writing, a copy of which written acknowledgment is filed with plaintiff's petition, marked "Exhibit B" and made a part of these findings by reference.

Immediately thereafter formal contract No. 3176-B, bearing date of May 15, 1918, was forwarded to plaintiff company and properly executed by the officers of said company.

Said contract was executed by Colonel H. J. Hirsch, Quartermaster Corps, United States Army, representing the Government. By the terms of said written contract plaintiff company obligated itself to furnish and deliver 20-oz. O. D. Melton at the price stipulated and pursuant to conditions specified in the copy of memorandum of award dated May 15, 1918, which was attached to said formal contract.

A true copy of the formal contract No. 3176–B is filed with plaintiff's petition, marked "Exhibit C," and is made a part of these findings by reference.

Under date of July 27, 1918, Maj. H. H. Schofield, Quartermaster Corps, for and on behalf of the United States, entered into a supplemental agreement with plaintiff company modifying contract No. 3176–B, dated May 15, 1918, the effect of which modification was to permit the contractor to make use of the wool actually allotted to it by the United States Government, to provide that the Melton instead of being 20-oz. all wool as per specifications No. 1316, except stock to be 20% noils or garnetted worsted thread waste, 20% pulled wool for white, and 60% fine cape wool.

A true copy of the supplemental agreement is filed with plaintiff's petition, marked "Exhibit D," and made a part of these findings by reference.

III. Plaintiff company began the performance of the contract on or about May 20, 1918, and continued making deliveries under said contract until November 15, 1918, on which date plaintiff company received a telegram from the Quartermaster Corps, requesting that all work on said contract be suspended. In the course of the performance of the contract plaintiff company was in default in making deliveries due to the fact that it could not get raw materials as needed. In September plaintiff company was 19,000 yards behind in its deliveries. All deliveries made by plaintiff company were accepted by the Government and paid for at the contract price.

IV. On November 18 the Quartermaster Corps sent plaintiff the following telegram:

"The following instructions received from the office of the Quartermaster General forwarded for your compliance and action. Stop dyeing any additional wool tops and

yarns and do not start in process any further material for the purpose of using the same under contracts with the Army. If you obtain any such dyed materials from other concerns you are instructed to notify them suspend further dyeing. You are authorized and requested as far as possible to take on civilian business and are authorized to use for this purpose any material owned by you and procured for the performance of your Army contract or contracts. You will not be held responsible for any delay caused by taking such action or for any delay or any failure to fulfill your Government contract caused by taking such action.

"YATES—Inspection."

V. Plaintiff company was required to obtain requisitions from the Government officials for the amount of wool necessary to perform the contract, at a price fixed by the Government. At that time all of the wool in the United States was controlled by the War Department and at the time the contractors were issued requisitions for wool they were required to sign a contract that it would be used only in the performance of Government contracts, unless they got further permission from the Government to use it for some other purpose.

VI. The cloth to be manufactured under the contract was to be of a khaki or olive drab color, which required contractor to purchase certain dyes and chemicals for the purpose of meeting the requirements of the contract as to color. Plaintiff company purchased 1,000 lbs. of dyes for which it paid $1.00 per pound and 500 lbs. of dyes for which it paid $2.50 per pound.

VII. At the time of the suspension of the work there was yet to be manufactured and delivered by plaintiff, under the contract, approximately 30,000 yards of cloth. Plaintiff company had on hand sufficient raw materials to complete the performance of the contract.

VIII. On about November 18, 1918, an inventory of plaintiff's stock on hand was made by the agents of the Government, who ascertained the amount of material that plaintiff company had on hand for the purpose of manufacturing the cloth covered by the contract, and said inventory as to

poundage and issue price of said material was in words and figures as follows:

Items	Wool poundage	Issue price
1	1,307 lbs.	$1.57
2	900 "	1.58
3	350 "	1.58
4	3,391 "	1.57
5	1,038 "	1.43
6	14,150 "	1.10
7	650 "	1.20
8	508 "	1.85

IX. Under date of November 23, 1918, Captain A. Stevens, of the Quartermaster Corps, acting under authority of the zone supply officer, issued a circular letter a copy of which was sent to plaintiff company as follows:

"Pursuant to instructions received from the Quartermaster General's Office November 23d in executive telegram number 13, you are notified of the following procedure in regard to terminating present contracts:

"1. This depot is directed to notify each contractor making blankets, meltons, shirting flannel, cap cloth, convalescent cloth and jerkin lining that it will accept delivery of an amount of yards or blankets that such contractor would have produced prior to December 21st, running at the average rate of production of such contractor under his contract for the period of four weeks ending November 9th. Such yardage will be accepted at any time prior to February 1st, thus allowing contractor to run part time if necessary to hold his organization pending starting of civilian work which should be started as soon as possible. It is not the present intention to authorize acceptance of any additional amounts.

"2. This depot is ordered to determine the exact number of yards or blankets which will be accepted under the foregoing ruling and will notify as soon as possible each contractor of the exact amount.

"3. Contractor is notified that the instructions to stop dyeing any additional wool, tops, and yarns, and not to start in process any further material, are modified only to the extent necessary to enable him to make the foregoing deliveries.

"4. Contractor is notified that the Government desires him so far as possible to take on civilian business and that he is not required to make any further deliveries of any part or

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all of the goods contracted for if he so desires. Contractor is authorized to use for civilian business any materials owned by him and procured for the performance of his Army contracts. Contractor is further notified that if he has any surplus Government wool, or surplus partly finished material made out of Government wool which he desires to use for civilian business, if he submits to the depot quartermaster an affidavit setting forth the amount and character of such wool and materials, and receives written authority from the depot quartermaster to use the same in his civilian business which the depot quartermaster is then authorized to give him, then he will be allowed by the Government the difference, if any, between the cost of such wool or material and what the cost would have been if the wool used had been purchased at such price or average price as such wool is sold for by the Government during the month of December.

"The supplemental contract by which that adjustment is effected will be passed on by the Board of Review as in other cases. The term surplus Government wool, or surplus partly finished material manufactured from Government wool, is used to cover that portion of said wool or said material which he will not require to produce the goods, delivery of which it is proposed to accept.

"By authority of the Zone Supply Office.

"A STEVENS,
"*Captain, Quartermaster Corps.*"

X. For the purpose of clarifying the circular letter dated November 23, 1918, the Government issued a revised adjustment under date of January 14, 1919, a copy of which was sent to plaintiff corporation and was as follows:

Combing wool	Govt. issue price	First allowance	Revised allowance	Various materials	First allowance	Revised allowance
Class V. S. A.	1.02	25%	35%	Worsted Merino yarns	25%	35%
Class IV S. A.	1.12	8%	15%	Woolen and Merino yarns, white, Lt. Oxfd.	30%	40%
Class III S. A.	1.28	------	15%			[illegible]
50s/56s S. A.	1.45	12%	15%	Woolen and Merino yarns, colored	40%	50%
¼ Blood Dom.	1.40	6%	15%	Colored wool ⅜ and fine	20%	30%
⅜ Blood Dom.	1.56	15%	20%	Colored high ¼ and lower	30%	40%
½ Blood Dom.	1.75	20%	20%	Noils and wastes	25%	35%
Fine Blood Dom.	1.80	20%	20%	Shoddy	25%	35%
Fine Australian	1.85	5%	10%	Worsted suiting clips	10%	25%
				Woolen suiting clips	10%	25%
CARDING WOOL				Overcoating clips	10%	60%
Carpet stock	.85	25%	25%	Shirting flannel clips	10%	No allow.
Low 40s-36s/40s	1.00	35%	35%	White cotton yarn	30%	30%
Low ¼ 44s/40s	1.15	30%	35%	Colored cotton warp on spool or skein	50%	50%
¼ 46s/46s/50s	1.25	25%	30%	Colored cotton warp in chains	55%	55%
⅜ 50s/56s	1.35	25%	25%	Colored cotton warp on warp beams	60%	60%
½ 58s/60s	1.65	20%	20%			
Fine 60s/64s 1.55	1.75	20%	20%			

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XI. According to the schedule of allowances promulgated by the Government in behalf of the contractors engaged in the manufacture of woolen materials for war purposes, the allowances and percentages based upon the issue price of the material would be as follows:

Items	Wool poundage	Issue price	Schedule of allowances	
1	1,307 lbs.	$1.57	20%	$410.39
2	900 "	1.58	20%	284.40
3	350 "	1.58	20%	110.60
4	3,391 "	1.57	20%	1,064.77
5	1,038 "	1.43	20%	296.87
6	14,150 "	1.10	35%	5,447.75
7	650 "	1.20	35%	273.00
8	508 "	1.85	50%	469.90
				8,357.68

The difference between the issue price of the material that plaintiff had on hand in December, 1918, and the market value of the material that plaintiff had on hand, and which was necessary for the completion of the contract, was $6,017.57.

In addition to the raw material that plaintiff had on hand, it had on hand at the time of the suspension of the contract dyes and chemicals purchased for use in the manufacture of wool materials required by the provisions of the contract, which dyes and chemicals were necessary in the performance of the contract, the cost thereof being $2,250.00.

In December, 1918, these dyes and chemicals had no market value. Plaintiff company still has the dyes and chemicals on hand.

XII. On November 18, 1918, plaintiff filed a claim with the Boston Depot, Quartermaster Corps, United States Army, for the difference between the issue or cost price of the material necessary for the performance of the contract and on hand at the time of the suspension of the contract, and the December, 1918, market price of said material. It does not appear from the evidence in the record what amount plaintiff alleged was due in the claim that it filed before the Boston Claims Board.

XIII. After the suspension of the contract and while plaintiff's claim was pending before the Quartermaster Corps, United States Army, plaintiff paid, under protest, to the United States Government, the invoice representing the cost or issue price of the wool poundage and material on hand on the date said contract was suspended. Under date of December 13, 1918, the wool purchasing quartermaster, Major O. T. Simpson, sent plaintiff company the following letter:

"Replying to yours of December 12th, in which you enclosed your certified check in payment of our wool invoices #7275, 7562, 7621, and 8332, and in re the matter of adjustment that you speak of covering wools you have on hand and not used, purchased by you for the fulfillment of a Government contract, we beg to advise that 'in those cases where manufacturing contracts are to be terminated and the contractor has on hand unused Government wool which he will not be able to use, the supplemental contract covering the termination of the original contract may properly provide for the repurchase by the Government of the unused wool at the original price paid, or to be paid, the Government.'

"The matter of adjustment of your contract should be taken up directly with the depot quartermaster to whom you delivered the finished product, which, in this case, would probably be the depot quartermaster, Cambridge, Mass.

"The words in quotation above are the instructions received by the undersigned under date of December 10th from the Director of Purchase, Storage, and Traffic, Washington, D. C., in re this matter.

"We fully believe that you will be reimbursed for any loss sustained by you as a result of having these wools on hand on account of the cancellation of contract."

XIV. On December 14, 1918, Col. A. W. Yates, Q. M. C., United States Army, sent plaintiff a cancellation agreement, known and designated as cancellation agreement No. 4, and urged plaintiff to execute the same and return it to the Quartermaster's Department. Said cancellation agreement bore the date of November 23, 1918, but it was not executed by plaintiff company until December 20, 1918, and approved by the Board of Review, Office of the Zone Supply Officer, December 21, 1918.

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On or about December 15, 1918, and prior to signing said cancellation agreement, L. W. Packard, manager of plaintiff company, talked over the long-distance telephone with Capt. A. Stevens, of the Quartermaster Corps, concerning the cancellation agreement and Capt. Stevens assured him that the Government would take care of the loss of wool and noils and raw material suffered by plaintiff company as a result of the cancellation by the Government of said contract.

Plaintiff company caused its agent and auditor to call at the office of the Boston Depot Quartermaster to ascertain what effect, if any, the signing of the cancellation agreement would have upon its claim for the difference between the issue price and the December price of materials which plaintiff had on hand at the time of the suspension of said contract. The officer in charge advised plaintiff's agent that the signing of said cancellation agreement would not affect or prevent the prosecution of said claim, which information was given to L. W. Packard, executive officer and manager of plaintiff corporation, who thereupon executed said cancellation agreement for and on behalf of plaintiff corporation. Article 2 of said cancellation agreement provides as follows:

"The United States and the contractor, for itself, its successors and assigns, do hereby mutually remise, release, and forever discharge each other from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims and demands, whatsoever, due or to become due, in law or in equity, by reason of or arising out of, or with respect to the articles or work hereby canceled, and this agreement shall constitute full and final settlement of all question and claim growing out of this cancellation."

A copy of said cancellation agreement was admitted in evidence and is a part of the record in this case and is made a part of these findings by reference.

XV. Plaintiff never, at any time, intended to relinquish or release its claim for the difference between the issue price and the December, 1918, price of the wool and materials which plaintiff had on hand at the time of the suspension of the contract, which claim was pending before the Boston

Depot Quartermaster at the time said cancellation agreement was executed by plaintiff.

XVI. Under date of January 14, 1919, 2nd Lieut. H. R. Kritler, Quartermaster Corps, sent plaintiff the following letter:

"Enclosed find claim of November 18, 1918. The undersigned, while checking up your claim, received copy of cancellation agreement which states in paragraph two:

"'The United States and the contractor, for themselves, their successors, heirs, legal representatives, and assigns, do hereby mutually remise, release, and forever discharge each other from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims, and demands, whatsoever, due or to become due, in law or in equity, by reason or arising out of, or with respect to the articles or work hereby canceled, and this agreement shall constitute full and final settlement of claims growing out of this cancellation.'

"This cancellation agreement was signed by a member of your firm and properly witnessed. It is therefore stated that no claims whatever can be made by you on contract No. 3176-B.

"By authority of the Zone Supply Officer."

The court decided that plaintiff was entitled to recover.

MEMORANDUM BY THE COURT

It is perfectly clear from the record that the parties to the settlement contract did not intend to include within its terms the claim here sued on. To include it within the general release relied upon by the defendant involves giving effect to the settlement of an item which was never within the contemplation of the parties in making it, which was not under consideration by them when the settlement was made, and was mutually understood to be aside from the matters closed up by the settlement. If it was included by the terms of the settlement it is clearly a mutual mistake, and the settlement contract may be reformed. This, we think, is unnecessary. We need not cite authorities to sustain the fact that a receipt or release, however conclusive in terms, is subject to explanation as to the subject matter of the accord and satisfaction. The plaintiff's claim for the

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difference between the issue and the market price of the wool had been filed and was pending when the agreement to cancel the contract was reached, and the parties to the agreement knew this to be the fact, and did not intend to preclude the settlement of the independent claim in the settlement contract. It was not a matter of disputation between them. Defendant concedes the justness of the claim, and we think judgment therefor is allowable. Judgment for the plaintiff in the sum of $10,607.68 will be awarded. It is so ordered.

CHICAGO & EASTERN ILLINOIS RAILWAY CO. v. THE UNITED STATES

[No. F-94. Decided June 18, 1928]

On the Proofs

Federal control of railroads; final settlement; exceptions.—Final settlement between the Director General of Railroads and the receiver of plaintiff's railroad *construed* to except therefrom the claims of third persons. See memorandum by the court.

The Reporter's statement of the case:

Mr. Will H. Lyford for the plaintiff. *Mr. Thomas P. Littlepage* was on the briefs.

Mr. Lisle A. Smith, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. A. A. McLaughlin* was on the briefs.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation, created under the laws of the States of Illinois. On May 27, 1913, and for several years prior thereto, the Chicago & Eastern Illinois Railway Company (hereinafter called the "old company") owned and operated railway lines in the States of Illinois and Indiana and engaged in interstate commerce. On said date the affairs and properties of the old company were placed in the hands of receivers appointed by the United

States District Court for the Northern District of Illinois, and from said date until December 28, 1917, said lines of railway (hereinafter called the "railroad") were operated by receivers, or a receiver, appointed by said court.

II. William J. Jackson was one of the receivers appointed as aforesaid, and his co-receiver having resigned said Jackson, February 10, 1915, became, and thereafter until April 27, 1918, continued to act as, sole receiver of the railroad. On December 28, 1917, the President of the United States took over the possession, use, control, and operation of the railroad, and through his agent, the director general, continued to possess, use, control, and operate the railroad until March 1, 1920, when possession and control were relinquished by him and again assumed by William J. Jackson as receiver.

III. Pursuant to a decree of foreclosure and sale entered in the receivership proceeding May 22, 1917, the railroad was sold April 5, 1921, to a purchasing committee, which assigned to the plaintiff its rights under such sale; and pursuant to further orders in the receivership proceeding, the plaintiff was let into posession of the railroad as of midnight December 31, 1921, and since said date has continued in such possession and in the operation of the railroad. Among the contract rights and assets acquired by the plaintiff under the orders of the court in the receivership proceedings was the claim against the United States which is the subject of this controversy.

IV. Negotiations were had between the director general and the receiver, but they could not agree upon the compensation which should be paid to the receiver for the use by the United States of the said railroad. Pursuant to the provisions of section 3 of the Federal control act (40 Stat. 451) the receiver, in November, 1919, procured the appointment by the Interstate Commerce Commission of a board of referees, to consider the receiver's claim for such compensation and to recommend to the President the amount to be allowed. The board of referees made its report to the President March 18, 1920, recommending that the receiver be allowed the sum of $4,450,000 for each year and pro rata for each fractional part of a year of Federal control.

The said recommendation involved only the question of compensation for the use of said railroad, and did not include questions of maintenance, depreciation, and the like.

V. The director general and the receiver were unable to reach an agreement on the basis of said report, or otherwise, prior to the making of the final settlement agreement, hereinafter mentioned.

VI. Subsequent to said report, and pursuant to the provisions of the transportation act, 1920 (41 Stat. 456), and more particularly sections 202 and 203 thereof, the receiver, September 24, 1920, filed with the director general a claim for compensation, and on account of all matters growing out of Federal control and operation of the railroad. This claim included an item for $86,348.98, designated "Agents' and conductors' balances Federal—February 29, 1920, as of July 31, 1920." This item was never withdrawn, but remained a part of the receiver's claim during all of the negotiations following the filing of the same. Such negotiations resulted in an agreement of settlement, hereinafter referred to, executed and delivered by the parties February 18, 1921, pursuant to which the director general paid to the receiver $3,000,000. A copy of this agreement is annexed to the petition as Exhibit A and made a part hereof by reference thereto. Copy of sections of the standard form of contract referred to in said agreement of settlement is included in Exhibit D annexed to the petition and made part of these findings by reference. The said amount of $3,000,000 was a lump sum and the receiver was not advised as to the items allowed by the director general, or as to the amount allowed on any item, with the exception of the item of compensation for the use of said railroad by the Government.

VII. The claim made by plaintiff in this suit is identical with the item referred to in Finding VI, *supra*, except that the amount is now reduced from $86,348.98 to $69,561.62.

VIII. The aforesaid sum of $69,561.62, so claimed, is comprised of items of $49,582.58 and $19,979.04, explained and accounted for as follows:

(1) (a) The receiver paid from his own funds $73,746.97 to other carriers who subsequent to Federal control completed freight transportation originating on said railroad

during Federal control, and who by reason thereof were entitled to that amount, whereas the amount so due was at the time of such payment on deposit in bank in his name as trustee for the director general, subject to the provisions of General Order No. 68, $70,154.10 thereof having been collected by the director general prior to termination of Federal control and upon termination turned over to the receiver, and $3,592.87 collected by the receiver subsequent to Federal control as trustee for the director general. The said General Order No. 68 is annexed to the petition as Exhibit B and made a part hereof by reference.

(b) The receiver also deposited in bank, in his name as trustee for the director general, subject to the provisions of said General Order No. 68, and charged to the director general in the account "Federal agents' and conductors' balances—February 29, 1920," the sum of $9,133.23, a part thereof, $8,093.29, having been collected during Federal control by the director general as prepaid charges on freight transportation completed by the receiver subsequent to Federal control originating on said railroad during Federal control, for which service the receiver was entitled to such amount and which the Federal treasurer turned over to him but which he deposited and accounted for as aforesaid, and the balance, $1,039.94, having been collected by the receiver after Federal control on like freight transportation, so completed by him, and to which he was entitled but which he deposited and accounted for as aforesaid. The aggregate of the said several amounts is $82,880.20, for which the receiver reimbursed himself to the extent of $33,297.62 as follows:

(c) The receiver credited to the director general in the said account, "Federal agents' and conductors' balances—February 29, 1920," $27,809.03, collected by the receiver from carriers delivering to consignees after Federal control shipments of which the said railroad appears to have been the intermediate carrier and on which the director general during Federal control had advanced $27,809.03 to prior lines.

(d) The receiver collected $5,488.59 (the balance of $33,297.62) from the consignees of shipments delivered by

him thereto after Federal control, originating on other lines during Federal control, being the amount which had been advanced to said other lines by the director general during Federal control, and retained the same.

After thus reimbursing himself, the balance due the receiver from the director general was $49,582.58 ($82,880.20 less $33,297.62).

(2) (a) Subsequent to the termination of Federal control the receiver expended from his own funds for the benefit of the director general the sum of $8,411.79 and charged the same to the director general in the account "Federal agents' and conductors' balances—February 29, 1920," and in addition thereto, during March, 1920, charged the director general in said account with the sum of $198,290.63, depositing same in bank in the receiver's name as trustee for the director general, which amount, so deposited, was thereafter disposed of in accordance with the provisions of said General Order No. 68. The total thus charged to the director general was $206,702.42.

(b) Subsequent to the termination of Federal control the receiver received from the conductors and agents of the said railroad cash in their hands at the termination of Federal control or collected by them thereafter, belonging to the director general, in the sum of $186,723.38, for which the director general was given credit in the account "Federal agents' and conductors' balances—February 29, 1920."

The difference between the total thus charged, $206,702.42, and the credit, $186,723.38, is $19,979.04, to which the receiver was entitled to be reimbursed by the director general.

By reason of the matters set out in this finding the receiver became entitled to be reimbursed by the director general in the aggregate sum of $69,561.62 ($49,582.58 plus $19,979.04).

IX. The account styled "Federal agents' and conductors' balances—February 29, 1920," was kept by the receiver as agent or trustee of the director general, pursuant to requirements and provisions of General Order No. 66, copy of which is annexed to the petition as Exhibit C and made a part of these findings by reference thereto, and the sums

deposited in banks in the name of the receiver, as trustee for the director general, were so deposited, and their account and disposition kept, pursuant to the requirements and provisions of General Order No. 68.

X. Prior to May 13, 1920, all the negotiations between the director general and the receiver related to compensation to be paid by the director general to the receiver, as rental for the use of the railroad during the period of Federal control. Such negotiations were concluded on May 13, 1920, by the refusal of the director general to pay the amount of compensation demanded by the receiver.

XI. Under date of May 24, 1920, Hon. John Barton Payne, then recently appointed director general, wrote a letter to the receiver's assistant as follows:

"In assuming my duties may I call attention to the importance of making final settlements at the earliest possible date with all companies?

"It will be my purpose to deal as liberally as may be to the end that all proper assistance may be given the roads, but action in this regard will be in aid of final settlements, it being the definite policy to wind up the affairs of the Railroad Administration at the earliest possible date with all companies.

"By final settlements is meant compensation, maintenance, and claims of all kinds pro and con.

"If genuine cooperation is given by the roads it is hoped that final settlements may be made with reasonable promptness."

XII. Immediately upon receipt of said letter, the receiver commenced negotiations with the director general, with the view of making a final settlement which would include not only the question of compensation, but also "claims of all kinds pro and con" as contemplated by said letter.

XIII. On June 3, 1920, the director general's finance officer, Mr. Sherley, made to the receiver an offer to pay $3,000,000 in settlement of the receiver's claims.

XIV. On September 24, 1920, the receiver delivered to the director general the claim referred to in Finding VI, *supra*, which included the item of $86,348.98, now reduced to $69,561.62.

XV. On September 30, 1920, the general counsel for the director general renewed the offer made by Mr. Sherley, and proposed that the director general would recognize a balance due the receiver of $3,000,000; would fund, on approved security, additions and betterments made by the director general on the railroad, for which the receiver was still owing the director general $3,500,000; and would certify to the Interstate Commerce Commission that such settlement was made on the basis of $4,000,000 compensation per annum.

XVI. This offer was accepted by the receiver in a letter dated September 30, 1920, addressed to the general counsel for the director general, " in full settlement of all outstanding indebtedness and accounts between the Director General of Railroads and the receiver of said railroad," subject to the approval of the District Court of the United States for the Northern District of Illinois.

XVII. On February 4, 1921, the director general having been advised that on the previous day the Interstate Commerce Commission had approved the reorganization plan for said railroad and that the receiver was prepared to present to the district court a petition for approval of the acceptance by the receiver of the offer of settlement made by counsel for the director general on September 30, 1920, counsel for the director general delivered to the receiver's representative at Washington a form of preliminary agreement of settlement and a form of final agreement of settlement, to be approved by the court in the receivership proceedings and thereafter to be executed by the parties. Prior to the furnishing of such forms there had been no discussion between the representatives of the receiver and the director general in reference to excluding from the settlement any of the matters included in the exceptions contained in the said form of final settlement agreement.

XVIII. On February 12, 1921, the receiver filed in the said district court his petition for instructions as to final settlement with the director general, and thereupon on the same date said court entered an order approving the form

of preliminary agreement and form of final settlement agreement substantially as said forms were delivered to the receiver's representative by counsel for the director general, and authorizing the receiver to execute them, and "take such further action as may be necessary fully to carry out such settlement." The form of final settlement agreement so approved is that referred to in Finding VI, *supra*, copy of which is annexed to the petition as Exhibit A. There were three parties to the preliminary agreement, the Director General of Railroads and agent of the President, the receiver of the Chicago & Eastern Illinois Railroad, and the Chicago & Eastern Illinois Railway Company, and it provided for funding of the amount of expenditures for additions and betterments on the property of said railroad while under Federal control in the amount of $3,425,000. The settlement so authorized by the district court was effected by the execution and delivery of said preliminary agreement and agreement of final settlement on the 18th of February, 1921.

XIX. In the negotiations between the representatives of the receiver and of the director general there was no discussion of or express reference to adjusting the account between the director general and the receiver, covering collection by the receiver of the director general's assets, and payment by the receiver of the director general's liabilities.

XX. Subsequent to the execution and delivery of said final settlement agreement, dated February 18, 1921, the director general demanded of the receiver and the receiver paid to the director general $282,591.26 as a balance of assets of the director general collected by the receiver in an account entitled "Federal assets collected," in excess of liabilities of the director general paid by the receiver in an account entitled "Federal liabilities paid." The director general still retains said amount. The amount of assets of the director general collected by the receiver, and of liabilities of the director general paid by the receiver, of which the said sum was a balance, was not included in the statement of claim, referred to in Finding VI, *supra*, filed with the director general September 24, 1920; and no assets of

the director general collected by the receiver, or liabilities of the director general paid by the receiver, were included in said statement, except in the item styled "Agents' and conductors' balances Federal—February 29, 1920, as of July 31, 1920," and except an item of $1,616.90 described in said statement as "Federal mileage script as of July 31, 1920." Said latter item was paid to the receiver by the director general subsequent to the execution of said agreement, dated February 18, 1921, under the following circumstances:

Request for payment of such amount was made in June, 1921, by F. R. Austin, auditor for the plaintiff, upon L. J. Tracy, comptroller, United States Railroad Administration. Such request was considered by a subordinate of Mr. Tracy, who had nothing to do with the settlement agreement, and without consulting Mr. Tracy or the director general, or getting advice from the division of law, such subordinate authorized payment of such amount to the plaintiff, and payment was made, and said amount has not been repaid to the director general, but he does not waive the right to demand repayment thereof.

XXI. Under date of February 24, 1925, plaintiff's president wrote a letter to the director general's director of the division of finance, Mr. Porteous, pursuant to General Order No. 68, requesting authority for the payment of $87,332.50 to the plaintiff out of Federal funds as reimbursement for balance due the plaintiff in the liquidation of the account "Federal agents' and conductors' balances—February 29, 1920," and also requesting that, pursuant to the last three paragraphs of General Order No. 68, under the caption "Federal financial requirements," the director general should forward to the plaintiff, in the usual manner, $89,332.50 to liquidate such indebtedness.

To this letter the director general replied by letter dated March 5, 1925, refusing to authorize such payment on the ground that "such balance was one of the items that was claimed in and covered by the settlement."

The court decided that plaintiff was entitled to recover, in part.

MEMORANDUM BY THE COURT

Plaintiff is here suing to recover certain items as to which its predecessor, the receiver, by reason of the matters set out in Finding VIII, became, before "final" settlement was entered into, entitled to be reimbursed by the Director General of Railroads. It is conceded that the settlement between the parties disposed of the items in suit, unless they were excepted from its operation by either one or both of the following paragraphs:

"3. This settlement does not include or affect any money or assets of the director general turned over to the railroad company or the receiver pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.

"4. This settlement does not include the obligations of the director general assumed in paragraphs (i) and (j) of section 4 of said standard contract, to save the railroad company and the receiver harmless as to claims, if any, of third persons, * * *."

The parties hereto have stipulated, and it is so found by the court, that the items involved were, prior to settlement, due the receiver from the director general. It is plain that "money or assets of the director general turned over to the railroad company or the receiver pursuant to General Order No. 68" did not belong to the receiver before the settlement was made and were not thereafter the receiver's or the railroad company's, unless the settlement gave them to the receiver or the railroad company, and we find that it did not. So that if the plaintiff is entitled to recover, it is under exception No. 4 and not under exception No. 3.

Exception No. 4 relates and is limited to the claims of third persons. The material portion of paragraph (i) of section 4 of the standard contract referred to in the exception is as follows:

"(i) The director general shall pay, or save the company harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken under Federal control, except the expenses which under this agreement are to be borne by the company."

And the material portion of paragraph (j) of said section is as follows:

"(j) Except as otherwise provided in this agreement, the director general shall save the company harmless from any and all liability, loss, or expense resulting from or incident to any claim made against the company growing out of anything done or omitted during Federal control in connection with, or incident to, operation or existing contracts relating to operation, * * *."

The amount paid to the receiver by the director general pursuant to the settlement was a "lump" sum, $3,000,000, the receiver not being apprised as to separate items, here material, that were allowed. The items in dispute were not to be borne by the receiver, were due him and were conceded to have been paid to him in the lump sum, unless included in the exceptions.

The first item is an amount of $73,746.97, which the receiver paid from his own funds to other carriers who, subsequent to Federal control, had completed service originating on the receiver's line during Federal control and who by reason thereof were thereto entitled. This was an obligation of the director general payable to third persons, should have been borne by him, and by exception No. 4 the director general agreed to save the receiver harmless therefrom.

The second item, $9,133.23, does not represent the claims of third persons, but was merely an amount due the receiver from the director general, improperly accounted for, and inadvisedly deposited by the receiver in bank as funds of the trustee for the director general. This item is not within the exceptions and must be presumed to have been disposed of in the final settlement.

The third item is an amount of $19,979.04, a balance in the receiver's favor in the account styled "Federal agents' and conductors' balances—February 29, 1920." This account obviously reflects the carriers' transactions with the public and must be held to come within the excepted items of the settlement.

The findings show that the receiver reimbursed himself to the extent of $33,297.62 in Federal accounts or from Fed-

Memorandum by the Court

eral funds, and the amount otherwise recoverable is to be diminished accordingly.

Plaintiff is entitled to recover as follows:

Finding VIII, (1) (a)	$73, 746. 97
Finding VIII (2)	19, 979. 04
	93, 726. 01
Less (Finding VII, (b))	33, 297. 62
Recovery	60, 428. 39

It is so ordered.

NIAGARA JUNCTION RAILWAY CO. v. THE UNITED STATES

[No. J-153. Decided June 18, 1928]

On Demurrer to Petition

Jurisdiction; transportation act of 1920; reimbursement of deficits during Federal control.—See *Wyandotte Terminal R. R. Co.* v. *United States*, 64 C. Cls. 329; 276 U. S. 630.

The Reporter's statement of the case:

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer. *Mr. Perry W. Howard* was on the brief.

Mr. Don F. Reed, opposed. *Hatch & Reed* were on the brief.

The memorandum by the court states the material allegations of the petition.

MEMORANDUM BY THE COURT

The plaintiff is one of the so-called short-line railways, and in its petition alleges that it sustained a deficit in railway operating income during the period of Federal control for the amount for which it asks judgment against the United States under what is known as the transportation act of 1920, 41 Stat. 456. The demurrer states in substance that no cause of action which is within the jurisdiction of the Court of Claims is alleged in the petition.

Section 204 of said act gave plaintiff a remedy if it incurred such a deficit as is covered by the act and this remedy would seem to be exclusive, as no other is provided. It presented its case to the Interstate Commerce Commission in accordance therewith, as shown by the petition, and its claim was dismissed. The question of whether the petition states a cause of action upon which suit can be maintained in this court is controlled by the case of *Wyandotte Terminal Railroad Co.* v. *United States*, No. E–389, decided December 5, 1927, by the Court of Claims, 64 C. Cls. 329, wherein it was said that the remedy created by the statute was exclusive. Following the decision in that case the demurrer must be sustained and the petition dismissed. It is so ordered.

WHARTON & NORTHERN RAILROAD COMPANY v. THE UNITED STATES

[No. E–586. Decided October 8, 1928]

On the Proofs

Transportation to and from Picatinny Arsenal; contract for train service; guaranty of earnings.—A contract with a common carrier guaranteeing certain earnings in return for the maintenance of special passenger service for the benefit of arsenal employees, was within the authority of the commandant for "the procurement of services," and was not invalid for lack of benefit to the Government where the service was valuable and necessary to the activities of the arsenal.

The Reporter's statement of the case:

Mr. Norman B. Frost for the plaintiff. *Mr. Charles S. Belsterling* and *Frost & Towers* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Perry W. Howard* was on the brief.

The court made special findings of fact, as follows:

I. The Wharton & Northern Railroad Company, hereafter called the Wharton & Northern, is a corporation organized and existing under the laws of the State of New

Jersey, having its principal office and place of business at Wharton, in said State.

II. The right of way of the Wharton & Northern carries it by or through certain Government reservations in the State of New Jersey, and at the time the services hereinafter mentioned were performed it served, among other Government establishments, the Picatinny Arsenal, hereafter called the arsenal, located at or near Lake Denmark, in said State.

III. During the latter part of 1918 and early in 1919 scheduled operations of the arsenal were impeded by difficulty in obtaining and keeping necessary operatives and labor to carry on the work, due to the fact that employees had to be obtained from distant points between which and the arsenal no adequate through transportation service existed. Under date of January 29, 1919, the War Department, Office of the Chief of Ordnance, Industrial Service Section, Washington, D. C., wrote to the Assistant Director of the Railroad Administration, Edward Chambers, referring to the situation in the following language:

" The lack of proper transportation facilities at the arsenal has been a source of great trouble to the commanding officer in procuring and managing labor at the Picatinny Arsenal. Unless we can secure adequate transportation for the workmen at Picatinny, it will seriously interfere with the ordnance progress at the arsenal."

And on February 26, 1919, Lt. Col. R. W. Pinger telegraphed to A. D. Smith, regional director, eastern region, U. S. Railroad Administration, as follows:

" On February 21st, Mr. Cullen, passenger traffic manager D., L. & W. R. R., informed general manager Wharton & Northern R. R. Company that special train from Morristown, New Jersey, to Picatinny Arsenal will be discontinued after February 28th on account of low earnings. In view of absolute necessity maintaining this Government establishment, it is requested that Mr. Cullen be forbidden to take this action. Also that special investigator be sent here to adjust whatever difficulties necessary. This matter is taken up directly in view of extreme urgency."

IV. On or about November 12, 1918, the Delaware, Lackawanna & Western Railroad, hereafter called the Lackawanna, and the United States Housing Corporation, here-

after called the Housing Corporation, agreed to operate a special workmen's train between Morristown, a station on the Lackawanna, and Lake Denmark, a station on the Wharton & Northern, for the use and convenience of persons employed at the arsenal and the United States Naval Ammunition Depot and for such other persons who might avail themselves of the use of said train. This special workmen's train was operated under the said agreement, which guaranteed a daily minimum compensation of $150 per day to the Lackawanna and $40 per day to the Wharton & Northern. No official of the arsenal was a party to said agreement.

V. On January 15, 1919, the Wharton & Northern informed the Lackawanna that the Housing Corporation would guarantee a minimum daily compensation of $190 for that month, after which time it would be up to the railroads to decide whether or not they would run the train without any further guaranty from the Housing Corporation, the revenue from the train to furnish the answer, and suggested that their roads continue the operation of the train for one month after January as an experiment on the same proportion of guaranteed earnings they were then receiving under the contract between the Lackawanna and the Housing Corporation.

VI. It was agreed that operation of the train should be continued by the Lackawanna and the Wharton & Northern as an experiment upon the express understanding that the revenue accruing from said operation to the Lackawanna should be not less than $143.00 per day. On February 21, 1919, the Lackawanna informed the Wharton & Northern that, owing to the failure of the train earnings to equal the minimum of $143 per day between February 7 and 14, inclusive, the service would be discontinued after February 28th. This notice brought forth a statement from the Wharton & Northern dated February 25, 1919, that they had conferred with officials of the arsenal, and a request from the Wharton & Northern that the Lackawanna continue the operation of the train until further notice upon the condition that the Wharton & Northern would pay the

Lackawanna the difference between the minimum of $143 per day and whatever the train earned.

VII. February 25, 1919, the commanding officer of the arsenal at Picatinny wired the regional director of the United States Railroad Administration that notice had been given that the special workmen's train would be discontinued after February 28, and requested that in view of the absolute necessity for the Government to maintain the arsenal, the Lackawanna be forbidden to discontinue the train. The matter was referred to Federal manager of the Lackawanna, who on February 26th advised the regional director that the special train had been operated under an agreement between the Lackawanna and the Housing Corporation with the understanding that if certain guaranties were discontinued, or the number of passengers carried did not meet the guaranty, the service would be discontinued; that the Housing Corporation declined to continue the minimum guaranty after February 1st; that the Lackawanna agreed and undertook to operate the train during the month of February upon representations that the number of passengers would meet the guaranty; that because the train had failed to earn the minimum guaranty the Lackawanna had informed the Wharton & Northern that the train would be discontinued after March 1st; and that at the request of the Wharton & Northern the Lackawanna had arranged to continue the operation of the train upon the understanding that the Wharton & Northern would make up the difference between the amount earned by the train and the minimum guaranty of $143 per day until the matter could be adjusted.

The operation of the train was accordingly continued during the month of March by the Lackawanna upon the guaranty of the Wharton & Northern that the Lackawanna should receive $143 per day. The difference between the train earnings for the month of March and the guaranty was $1,017.72, which amount was billed against the Wharton & Northern by the Lackawanna and subsequently paid by the Wharton & Northern.

VIII. On March 28, 1919, the regional director telegraphed Lieut. H. Sinclair, United States Navy, at Lake Denmark, that the train earnings had fallen below the

amount of the guaranty and continuance would result in loss, and unless the Lackawanna received from some other source the difference between the earnings and the amount guaranteed, continuance of the service could not be justified.

April 11, 1919, the Wharton & Northern advised the Lackawanna that owing to small revenue the special train service would have to be discontinued after April 12, 1919, but that the Wharton & Northern would run the special train on its own line from Wharton.

April 12, 1919, the Lackawanna telegraphed the regional director as follows:

"Last evening * * * Wharton & Northern Railroad advised by telephone that pending advice from Washington as to whether the Government would assume the difference between the actual earnings and prescribed minimum the Wharton & Northern would be responsible for same, and for this reason we have arranged to continue train until further notice."

to which the regional director replied as follows:

"Confirming phone conversation Mr. Kelly regarding train service between Morristown and Picatinny Arsenal, War Department has given reasonable assurance that they will find some way of meeting guaranty and request continuation of service until they can make further investigation, which will be done at once. Please therefore continue operation of this service until further notice."

On April 25, 1919, the regional director wrote the Lackawanna as follows:

"Following wire from Mr. Edward Chambers, Director Division of Traffic:

"'My wire twenty-fourth War Department advises Ordnance Department has been authorized arrange guaranty Picatinny Arsenal train. Please confirm and advise if continuance will be arranged.'

"Will you please arrange to continue train and advise me when you have received necessary guaranty from Ordnance Department."

The Lackawanna, under date of April 26, 1919, sent the following acknowledgment to the regional director:

"This will acknowledge receipt of yours of April 25th, quoting message from Mr. Edward Chambers, director,

division of traffic, requesting that special train service between Morristown and Picatinny Arsenal via D., L. & W. R. R.-W. & N. R. R. be continued, inasmuch as Ordnance Department has been authorized to arrange for guaranty.

"We will, as per your instructions, continue the train and advise when the necessary guaranty is received from the Ordnance Department."

Also, on April 25, 1919, the Ordnance Office at Washington, D. C., sent the following letter to the commanding officer of the arsenal:

From: Ordnance office, field service, ammunition division.
To: C. O., Picatinny Arsenal, Dover, N. J.
Subject: Agreement for train service between Morristown and Picatinny Arsenal.

1. This office is just in receipt of letter from the chief, transportation service, recommending that funds be made available by the Ordnance Department to pay for the service of a train from Morristown, N. J., to Picatinny Arsenal for the accommodation of employees engaged at that plant.

2. It is explained that the railroad company is losing money at the rate of about $33.00 per day; that the actual cost of this train service is $183.00 per day, while the revenue derived from paid fares has gradually decreased to about $150.00 a day.

3. It is desired that you immediately get in touch with the officials of the railroad which operates this train, and make an informal agreement to charge a certain fare per person with a minimum compensation of $183.00 per day or whatever amount is agreed upon.

4. It is suggested that you arrange to pay for the transportation of the employees and reduce their wages by an equivalent amount.

5. The cost of transportation will be paid for out of the same funds as the compensation of the employees.

By order of the Acting Chief of Ordnance.

L. M. FULLER,
Colonel, Ord. Dept., U. S. A.
By R. SEARS,
(R. SEARS)
Lt. Col., Ord. Dept., U. S. A.

IX. The Ordnance Office letter of April 25, 1919, was returned by the arsenal with first endorsement dated April 29th, as follows:

"1. The suggestion in paragraph #4 above, is considered impracticable. The employees of this arsenal are paid out from eight to twenty different appropriations and from one hundred to two hundred different allotments. Furthermore, some of them come from Morristown and others from Dover and Wharton. The bookkeeping necessary to 'reduce their wages by equivalent amount' would unquestionably cost more than the $33.00 loss above mentioned, if it could be done at all.

"2. The above situation is further complicated by the fact that employees of the naval powder depot adjoining the arsenal on the south also use this train. If this arsenal were to pay for the complete operation of the train (viz $183.00 per day), it would be practically impossible to handle this Navy business except by selling tickets to the Navy employees at a fixed price. As this price might be more or less than that deducted by the arsenal from its employees' wages on a strictly cooperative basis, dissatisfaction would be almost bound to occur.

"3. In view of the fact that the greater proportion of the passengers on this train are those employed by the arsenal, it is recommended that a special allotment be given this arsenal to pay whatever deficit the railroad company now sustains, the certificate of the railroad auditor being considered adequate for the purpose. To pay this deficit 'out of the same funds as the compensation of the employees' as suggested in paragraph #5 is practically impossible on account of the large number of appropriations and allotments above mentioned. No attempt should be made to require the Navy Department to pay their share of the deficit at least for the present, as the amount involved would be small so far as they were concerned.

"4. In previous correspondence or telephone message with the transportation service, it is believed that a statement was made by this arsenal to the effect that the railroad company could increase its present fares to such a point as would make this deficit practically negligible. Mr. Stryker, the general manager of the Wharton & Northern states that this is incorrect, in that the present fares are as high as permitted under existing laws. If the U. S. were to take over the entire train, paying the railroad companies $183.00 per day, it might be possible for the arsenal then to sell tickets to the employees at such increased rate as would reimburse the U. S. completely. However, the undersigned would not wish to make such increase without definite

orders from higher authority, backed up preferably by the consent of the Railroad Administration."

The Ordnance Office returned the letter to the arsenal, with second indorsement dated May 7, 1919, as follows:

ORDNANCE OFFICE, FIELD SERVICE,
May 7th, 1919.

To Commanding Officer, Picatinny Arsenal, Dover, N. J.

1. As requested in preceding indorsement an allotment of $4,000 has been made from the appropriation "Ordnance Service, 1919" to cover necessary expenses for operation of daily work train from Morristown, N. J., Dover, N. J., and Wharton, N. J., to Picatinny Arsenal from April first, 1919, to June thirtieth, 1919.

2. This allotment is covered by allotment request sheet #0-2103-S, copy attached.

By direction of the Acting Chief of Ordnance.

L. M. FULLER,
Colonel, Ord. Dept., U. S. A.
By JAS. FORRESTAL
(JAS. FORRESTAL, JR.)
Capt., Ord. Dept., U. S. A.

X. On the same day the above allotment was made to cover the expense for operation of the special workmen's train; that is, on May 7, 1919, the Wharton & Northern sent the following communication to the Lackawanna:

"As a result of a conference with Col. R. L. Pinger on the subject of daily guaranty of revenue for the special thru train now plying between Morristown on the D., L. & W. and Lake Denmark on the Wharton & Northern, in both directions; it developed that the Ordnance Department of the U. S. Government will agree to make up any deficit between the actual earnings of the train and our required guaranty.

"During the conversation between Col. Pinger and myself, I made it clear to him, and he agrees to pay any deficit to the Wharton & Northern Railroad and, of course, we will accept your bill each month, representing the amount due you as between the actual earnings and your minimum of $143.00 per day.

"It is also understood that in case (which fact looks very probable) the earnings of this train go beyond the fixed guaranty, such an amount will accrue to the railroads.

"Selling of tickets, collecting of same, operation of train schedule, etc., are satisfactory and are to remain as they

are at present and the train not to exceed ten cars as per the provisions of Nov. 4th in agreement with the U. S. Housing Corp.

"The rates of fare, viz, 34¢ per round trip between stations east of Dover, including Morristown and Lake Denmark.

"30.8¢ per round trip between Dover and Lake Denmark.

"18¢ per round trip between Wharton and Lake Denmark.

"For passengers to avail themselves of the use of this special workman ticket and to such passengers who do not avail themselves of this ticket, the regular tariff rate on each railroad will be applied.

"It is understood, of course, that passengers using this train and those who have monthly trip or other transportation as advertised by either road, the same will be honored on this train and due credit given the same. I am to give the colonel an extract or form of some kind of contract in which will be embodied the above language; but before doing so won't you kindly scrutinize the same and advise me quick whether the same is in accordance with your recommendations and if not kindly criticise so that I may make this form one that will be agreeable to all parties concerned."

to which letter the Lackawanna sent the following reply dated May 9, 1919:

"I have your letter of the 7th instant with respect to conference with Col. R. L. Pinger, on the subject of guaranty of revenue for special through train now plying between Morristown and Lake Denmark, and find your understanding therein expressed to be correct in each particular.

"I understand that you have arranged to prepare a form of contract or memorandum of understanding based upon the details set forth in your letter and will be glad to have a copy of same when you do so."

XI. May 24, 1919, the manager of the Wharton & Northern sent the following written communication to the arsenal:

"In the matter of continuance of the present workmen's train plying between Morristown on the D., L. & W. and Lake Denmark on the Wharton & Northern, for the convenience of Picatinny Arsenal, I beg to submit as follows:

"This train, consisting of one locomotive and not more than ten cars, making one round trip in the morning and one round trip in the evening between these two points above mentioned, operating on the same schedule as is in

effect at the present time, will be continued until advised by you to the contrary.

"This train is to be operated on a basis of a guaranteed earning of $163.00 per day, the Ordnance Department agreeing to make up any deficit between the actual earnings of the train and the aforesaid mentioned guaranty.

"It is also understood that in lieu of the low minimum of guaranty as is herewith fixed, should the revenue from passengers exceed $163.00 per day such an amount would accrue to the railroads.

"This company will render a detailed statement each month showing the amount of actual earnings of the train, rendering a bill covering the amount of deficit, should any exist. Tickets will be sold by agents of the Lackawanna Railroad at all stations, Wharton to Morristown, inclusive, and rates of fares to continue as prescribed by the present tariff.

"I am attaching herewith detailed statement showing the loss which the Wharton & Northern Railroad was compelled to pay to the Lackawanna during the month of April in order to keep this train on for the accommodations of the arsenal employees. In view of this fact it is respectfully requested that you forward us remittance to cover this loss, we feeling justified in making this request inasmuch as we continued to operate this train giving the Ordnance Department time to consider the continuation of same."

The commanding officer of the arsenal replied to the above communication by letter dated June 12, 1919, as follows:

"A copy of your invoice covering deficit sustained during the month of April was returned to you June 2, 1919, together with public voucher covering the same. It was requested that you accompany the invoice with affidavits certifying to the correctness of the invoice and that you also sign the voucher. The invoice will be passed for payment as soon as the above request has been complied with.

"Referring to verbal conference and to your letter dated May 24, 1919, it is the understanding of the undersigned that the workmen's train operating between Morristown and Lake Denmark will be continued until such time as the commanding officer at this arsenal shall request, in writing, the discontinuance thereof, on the following basis:

"(1) That the train shall consist of one locomotive and at least ten cars, unless a lesser number of cars shall be approved by the commanding officer.

"(2) That two round trips shall be made each day, holidays and Sundays excluded, in accordance with the schedule

now in operation, such schedule being subject to modifications as may be approved by the commanding officer.

"(3) That the above service is to be rendered in consideration of the average guaranteed earnings of $163.00 per day, holidays and Sundays excluded, the arsenal agreeing to make up any deficit between the actual earnings of the train and the aforementioned guaranty.

"(4) That it shall be understood that all revenue accruing from the services rendered, whether on account of transportation of arsenal employees or other passengers using any portion of the service, shall apply to the aforementioned guaranteed earning of $163.00 per day.

"(5) That any excess over $163.00 per day shall be applied toward the average daily earnings for any current month, provided that if the average daily earnings exceed the guaranteed earnings, such excess shall accrue to the Wharton & Northern Railroad.

"(6) That the Wharton & Northern will render a detailed statement each month showing the amount of actual earnings of the train, together with affidavit certifying to the correctness of the statement so rendered.

"(7) That tickets will be sold by agents of the Lackawanna Railroad between Morristown and Wharton, inclusive, and that rates of fare shall continue as prescribed by the present tariff, subject to such modifications as may from time to time be approved by the commanding officer.

"If the above proposals meet with your approval it is requested that you submit a prompt reply so indicating."

XII. The special workmen's train was continued by the Wharton & Northern under the above arrangement and the arrangement which existed between it and the Lackawanna until June 25, 1919, when the arsenal informed the Wharton & Northern that the Army appropriation bill had not been approved and that if approved by June 30 there was no guaranty that the arsenal would receive the funds estimated for, and notified the Wharton & Northern that beginning July 1, 1919, the train to and from the arsenal. if operated, would be at its own risk. Accordingly, the Wharton & Northern on June 27, 1919, sent notice to the Lackawanna that it was necessary to withdraw the special workmen's train as of June 30, 1919, and stated that thereafter regular passenger train would be operated between Wharton and Lake Denmark on the Wharton & Northern for the accommodation of the employees of the arsenal.

The said special workmen's train was accordingly discontinued, effective June 30, 1919.

XIII. From time to time the Wharton & Northern submitted to the commanding officer of the arsenal certified statements showing the actual earnings accrued from the operation of the said workmen's special train between April 1 and June 30, 1919. Payments were made to the Wharton & Northern by a disbursing officer of the arsenal in July and August, 1919, for the difference between the accrued revenues and the minimum compensation of $163 per day, as follows: April, $1,540.78; May, $1,736.88; June, $1,743.85, a total of $5,021.51. These payments were charged to the appropriation "Ordnance service, 1919," authorized by the act of July 9, 1918, 40 Stat. 869.

XIV. Under date of September 12, 1923, the commanding officer of the arsenal informed the Wharton & Northern as follows:

"During July and August, 1919, your company received checks from this arsenal totaling $5,021.51 as reimbursement for deficit paid to the D., L. & W. R. R. Co., in connection with the Morristown-Lake Denmark train for the months of April, May, and June, 1919. * * *

"These payments were disallowed in the accounts of the disbursing officer as being contrary to law, and in a review rendered to the Secretary of War under date of August 15, 1923, the Comptroller General of the United States affirms the disallowance and directs that the erroneous payments be recovered.

"In view of the above, it is requested that your check for $5,021.51, made payable to the commanding officer, Picatinny Arsenal, be forwarded to this office."

The Wharton & Northern replied to the above request by letter dated September 13, 1923, as follows:

"Colonel Pinger's file TLK–BH of June 12, 1919, copy of which is attached, article three of which provided that the arsenal agrees to make up any deficit between the actual earnings of the train and guaranteed amount, and his file RWP/CNR of June 25, 1919, copy of which is attached, instructs us as to time when the United States Government will not further guarantee to reimburse the railroads for losses incurred because of the operation of this train.

Reporter's Statement of the Case

"We believe this will be sufficient to advise your office that we decline to consider any refund, as is suggested in your file of September 12, 1923."

XV. The Wharton & Northern was notified by the Comptroller General under date of November 30, 1923, as follows:

"By settlement No. T–73010–W, dated November 30, 1923, you have been allowed the sum of $5,086.26 as freight transportation during August, 1922, and from February to September, 1923. The records of this office show that you are indebted to the United States in the sum of $5,021.51 erronously paid to you as the difference between $163.00 a day, guaranteed, and the amount actually collected as fares for the operation from April 1 to June 30, 1919, of a special daily passenger train between Morristown and Lake Denmark, New Jersey.

"Settlement No. T–73010–W has been amended, and of the amount therein allowed, $5,021.51 has been directed to be deposited into the Treasury to the credit of the appropriations under which the improper payments were made. A check for the balance, $64.75, will be mailed to you in due course by the Treasurer of the United States."

Thereafter the Wharton & Northern applied for a review and reconsideration of the settlement of November 30, 1923, but the Comptroller General refused to allow the whole or any part of the set-off of $5,021.51 claimed in this suit.

In addition to the bill for $1,017.72 for the amount of the deficit guaranteed by the Wharton & Northern for the month of March, 1919, referred to in Paragraph VII hereof, the Lackawanna also rendered bills against the Wharton & Northern for the difference between the guaranty of $143 per day and the actual train earnings, as follows: April, $1,746.62; May, $1,965.32; June, $1,959.89; a total of $5,672.83, all of which was duly paid by the Wharton & Northern and none of which has ever been repaid.

During the period of the services in question there was in effect General Order No. 7 of the Ordnance Department, October, 1917, providing as follows:

"*Officers authorized to make purchases.*—95. Commanding officers of arsenals and other ordnance stations and such other officers as may be detailed for the duty are hereby authorized to contract on behalf of the United States for

and to make the necessary purchases of ordnance, ordnance stores, and supplies, and the procurement of services under the direction of the Chief of Ordnance."

The court decided that plaintiff was entitled to recover $5,021.51.

MOSS, *Judge*, delivered the opinion of the court:

This action is for the recovery of $5,021.51, which was paid to plaintiff railroad company for services in the operation of a special workmen's train to and from Picatinny Arsenal in the State of New Jersey, and which was thereafter deducted from a claim due plaintiff for other transportation services performed for the Government.

In November, 1918, under an agreement with the United States Housing Corporation, the Delaware, Lackawanna & Western Railroad began the operation of a special workmen's train between Morristown, a station on the Lackawanna, and Lake Denmark, a station on plaintiff's line, for the transportation of workmen employed at the Picatinny Arsenal and the United States naval ammunition depot, which point was on the line of plaintiff's, the Wharton & Northern, railroad. This train was operated under said agreement which guaranteed a daily minimum earning of $150 per day to the Lackawanna, and $40 per day to the Wharton & Northern. In January, 1919, the Housing Corporation announced that the guaranty of the minimum daily compensation would continue only for that month. The operation of said train was, however, continued through the months of February and March, by an agreement between the two railroads, under and by which plaintiff company guaranteed to the Lackawanna a minimum daily earning of $143 per day. While these activities were in progress the commandant of the arsenal was negotiating with the proper governmental authorities for a continuation of the special train service. The final result of said negotiations was an agreement between plaintiff company and the commandant of the arsenal for the continuation of said train. Although the train was to be run as theretofore, partly over the Lackawanna and partly over plaintiff's line, the agree-

ment was wholly between the Wharton & Northern Railroad and the Government, the latter company guaranteeing to the Lackawanna its proportion of the minimum guaranteed earnings to the extent of $143 per day. Under this arrangement plaintiff company thereafter paid to the Lackawanna sums aggregating $5,021.51, which is the difference between the guaranty of $143 per day and the actual earnings of the Lackawanna, and said sums were paid to plaintiff by the Government. Four years later said amount was deducted from a claim due plaintiff for other transportation services performed for the Government. It will be observed that while the dates of the communications which constitute said agreement are subsequent to April 1, 1919, the agreement to which they relate, and under which the special train was then being operated, became effective on that date, April 1, 1919. The train was discontinued, effective June 30, 1919.

It is the contention of the Government that the commandant of the arsenal was without authority to make the contract for the operation of the special train. This contention can not be sustained. During the period of the services in question there was in effect a general order, No. 7, of the Ordnance Department, which provided: "Commanding officers of arsenals and other ordnance stations and such officers as may be detailed for that duty are hereby authorized to contract on behalf of the United States for and to make the necessary purchases of ordnance, ordnance stores, and supplies, and the procurement of services, under the direction of the Chief of Ordnance." This was a contract for the *procurement of services*, and the commandant of the arsenal was properly authorized and directed by the Acting Chief of Ordnance to make said agreement. See Finding VIII. It is further urged by defendant that, even if that officer had authority to make the contract, it was invalid, for the reason that the Government derived no benefit from its performance. The urgent necessity for the continuation of the special workmen's train is disclosed in the correspondence set out in the findings of fact. It was the opinion of the Chief of Ordnance, of the commandant of the arsenal, and of the regional director of the Railroad Administration, that the

service furnished was valuable and necessary. It was, in fact, essential to the very maintenance of the activities of the arsenal. An allotment of $4,000 was made by the Ordnance Department from the appropriation "Ordnance service, 1919," which was used to cover the necessary expenses of operating said train. Defendant's contention on this point is likewise untenable. Plaintiff is entitled to recover, and it is so adjudged and ordered.

SINNOTT, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

JOHN FISLER v. THE UNITED STATES[1]

[No. E-450. Decided October 8, 1928]

On the Proofs

Taxes; social club; membership dues.—Where a club engages in purely social activities that are a material part of the organization, not merely incidental to another purpose, it is a social club within the meaning of the statutes which impose a tax upon the dues or membership fees of a "social, athletic, or sporting club or organization."

The Reporter's statement of the case:

Messrs. John F. McCarron and *George E. Hamilton* for the plaintiff. *Mr. Henry Preston Erdman* was on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a citizen of the United States and a resident of the State of Pennsylvania.

II. Plaintiff is and for several years past has been a member of the Manufacturers' Club of Philadelphia, Pennsylvania, including the years of 1923, 1924, and 1925, and was a former president of said club. As a member of said

[1] Certiorari denied.

Manufacturers' Club, plaintiff has been compelled to pay taxes on dues as a member of said club under date of April 4, 1924, in amount of $11, which amount was transmitted to the collector of internal revenue at Philadelphia under date of October 24, 1924, along with the taxes on dues of other members of said club in the amount of $10,466.26, and he also paid the amount of $11 as taxes on dues as a member of said club under date of April 6, 1925, which amount was transmitted to the collector of internal revenue at Philadelphia, under date of May 26, 1925, along with the taxes on dues of other members of said club amounting to $10,949.88; the Commissioner of Internal Revenue having ruled that the social features of said club form a material purpose of the organization and that it is a social club within the meaning of the several revenue acts providing for the assessment of taxes on dues of members of a social, sporting, or athletic club.

III. On May 28, 1925, plaintiff filed with the collector of internal revenue a claim for refund of the $22 paid by him as taxes as aforesaid, and on July 11, 1925, the Commissioner of Internal Revenue rejected the said claim.

IV. The Manufacturers' Club was incorporated on June 11, 1887, under the act of the State of Pennsylvania approved April 29, 1874, entitled "An act to provide for the incorporation and regulation of certain corporations," as amended by the act of April 17, 1876. Said act provides, among other things, for the incorporation of corporations "for the encouragement and protection of trade and commerce." Provision VI of said corporation act states the purpose of clubs organized thereunder to be for "The maintenance of a club for social enjoyments." The purpose of the said club, as expressed in its charter, is as follows:

"That the subscribers, having associated themselves together for the purpose of the maintenance of a club for social enjoyments * * * do hereby declare, set forth, and certify that the following are the purposes, objects, articles, and conditions of their said association for and upon which they desire to be incorporated:

"II. The purpose for which the corporation is formed is to maintain a club for social enjoyments and to bring the

manufacturers of the city of Philadelphia and vicinity into more cordial and social relations, and to enable them to act unitedly in all affairs of interest to their industries."

V. Sections one, two, three, four, and five of article eight of the constitution and by-laws provide for the following classes of membership:

"SECTION 1. The membership of the corporation shall consist of active members and nonresident members. There shall be two classes of active members, namely, resident members and life members. There shall be three classes of nonresident members, namely, nonresident, Army, Navy, clerical and consular, and honorary. The number of each class of membership shall be determined by the board of directors.

"SEC. 2. All adult male persons residing within a radius of fifty miles from Philadelphia, who are engaged in or identified or connected with manufacturing interests, or after having been so engaged have retired from active business, shall be eligible to active membership.

"SEC. 3. All adult male persons who do not have a place of residence or business within twenty-five miles of the clubhouse, and whose business relations do not afford them a regular business address within twenty-five miles of the clubhouse, shall be eligible for nonresident membership.

"SEC. 4. Nonresident, Army, Navy, clerical and consular, and honorary members shall not be entitled to vote, nor to hold office in the club, nor shall they have any right or ownership in its property.

"SEC. 5. Honorary members of the club may be elected for one year by a unanimous vote of any regular meeting of the board of directors."

Persons applying for membership must do so according to sections one and two of article nine of the by-laws, as follows:

"SECTION 1. Application for membership shall be made in writing; it shall state the name, residence, and occupation of the applicant, the class of membership desired, and shall be duly endorsed by two members in good standing.

"SEC. 2. The name, residence, and occupation of every candidate for admission and the name of his proposer shall be posted upon the registry board at least twenty days before he can be admitted."

However, the membership of the club is not confined to to persons associated, connected, or affiliated with the manufacturing industry.

VI. The by-laws of the Manufacturers' Club provide for the following standing committees:

House committee, committee on commerce and transportation, committee on legislation, committee on reception and entertainment, committee on finance, committee on the library, committee on art, committee on auditing, and committee on membership.

In addition to these standing committees various other committees were duly appointed or elected by the board of directors, among which were a bowling committee, a billiard committee, a card committee, a dancing committee, and a country club committee.

VII. In addition to the above committees, the Manufacturers' Club had a trade council within the club of industries represented in the club whose delegates were club members. It devoted itself to the problems of business and legislation and embraced every aspect of business life such as manufacturing, merchandising, wholesaling, retailing, and transportation. The trade council functioned directly under the supervision of the president and board of directors of the Manufacturers' Club. It had for its purposes conferences and decisions as to business policies and the carrying of such policies into effect.

VIII. The Manufacturers' Club cooperates with all trade bodies in the city of Philadelphia and the State of Pennsylvania. It cooperates extensively in furthering specific business interests in Philadelphia with the Philadelphia Bourse, an organization of the manufacturers, merchants, insurance men, shippers, steamship and railroad interests of Philadelphia, the Chamber of Commerce of Philadelphia, Philadelphia Board of Trade, Commercial Exchange of Philadelphia, the Maritime Exchange of Philadelphia, the Drug Exchange, the Grocers and Importers Exchange, the Lumberman's Exchange, the Real Estate Board of Philadelphia, and the Pennsylvania Manufacturers Association.

IX. In cooperation with the Philadelphia Bourse and the Chamber of Commerce of Philadelphia, the Manufacturers' Club has furthered the movement for improvement of the Philadelphia Harbor, has settled longshoremen's strikes,

taken an active part in formation of Belt Line Railroad, and formation of foreign trade zones in foreign ports. It has also cooperated in regard to railroad consolidation, question of freight differential, separation of rail haul and terminal rates, development of the city of Philadelphia's comprehensive plan, which included that of Latin American trade, and the president of the Philadelphia Manufacturers' Club was appointed by the mayor of Philadelphia chairman of the Latin American trade committee. Under the same plan the vice president of the Manufacturers' Club was appointed by the mayor of Philadelphia chairman of location of new manufacturing sites because he was vice president of the Manufacturers' Club. These were part of the plans for the expenditure of $500,000,000 worth of development of the city of Philadelphia which is now being put into effect.

X. The Manufacturers' Club brought into existence the Taxpayers' League of Pennsylvania, that deals with Federal taxation problems. A representative of the Manufacturers' Club was one of three representatives that represented Pennsylvania in the formation of the National Council of State Legislatures dealing with taxation problems. It also brought about the establishment of the Philadelphia Textile School in Philadelphia, an educational institution on industrial lines of special textiles. The Manufacturers' Club furthered a movement in Philadelphia among the insurance companies and public utilities to expose the subject of fraudulent accident claims, involving mostly personal injury, but including also property damage claims. It has a representative in Washington at an annual salary who keeps the club posted on legislative matters for or against industrial interests of the country, and it is also represented at Harrisburg, the capital of Pennsylvania, during sessions of the Pennsylvania Legislature, regarding legislation affecting business and industrial interests. The club has had its representatives appear before the committees of Congress, where arguments and briefs have been made and filed relative to the tariff, tax, and other economical problems on behalf of the club, and it has framed many resolutions and submitted many sug-

gestions to the Ways and Means Committee of the Congresses regarding business interests. It has also filed briefs on railroad consolidation with the Interstate Commerce Commission.

XI. In the Manufacturers' Club sections of memberships are formed, such as the Worsted Spinners' Association, the Hosiery Association, the Leather Association, and the Foundrymen's Association, with others. When deemed advisable for the interest of some particular industry, the secretary of the section pertaining thereto calls a meeting of that association, obtains a room in the club building where a luncheon is held at which there is a discussion as to the best policy to be pursued. If an agreement is reached, the association will request the Manufacturers' Club to take up the particular industrial policy decided upon and urge its adoption. Many such section meetings are held.

XII. The Manufacturers' Club publishes a publication known as "The Manufacturer," dealing with articles on economics, legislation, industrial questions, relationship of employers and employees, trade and commerce, and affiliated questions and business generally. It is published in a large edition on the first of each month and a smaller edition on the twentieth of each month. About 3,700 copies are published each month and are sent to the club's membership and mailed free to chambers of commerce, trade information bureaus, trade organizations, the Library of Congress, Government departments, universities and colleges, banks, publishers, and editors. "The Manufacturer" is not copyrighted and the use of its articles is permitted to be published or used by anyone.

A department in this publication entitled "Lobby Lyrics" is devoted almost exclusively to the social life of the Manufacturers' Club and to events of a social nature occurring in the club building.

"The Manufacturer" circulates among all classes of readers; its principal clientage, however, is manufacturers.

XIII. The Manufacturers' Club is located on Broad and Walnut Streets in the city of Philadelphia. The property fronts on the west side of Broad Street, and also has a

front on the north side of Walnut Street, and on the south side of a small street known as Moravian Street, upon which is erected a ten-story and basement stone building, which cost approximately $2,700,000.

In the basement, in addition to power and heating plant, is a barber shop, Turkish-bath room, bowling alley, pool and billiard room, and a large grillroom.

On the first or ground floor there is a large lobby and a large waiting room equipped with comfortable chairs and lounges and current newspapers and magazine files, which is used principally for waiting on appointments to meet people and informal conferences, etc.; also a clerk's office for the distribution of mail, etc., telephone booths and a small room used for quick lunch and refreshments.

On the second floor is the directors' room, used for meetings of the board of directors and for most of the committee meetings of the various committees of the club; also a card room, a large library and reading room, containing a large collection of books, and a large assembly room used for committee meetings, smaller club meetings, trade meetings, and small convention meetings.

The third floor and gallery is the auditorium used for large meetings of the club; large conventions and similar gatherings; also for lectures, entertainments, and the like. This auditorium is available for private functions and is rented by the club to private parties for conventions or social purposes.

The fourth, fifth, sixth, and seventh floors contain together seventy-four rooms, adaptable and principally used for bedrooms and suites of rooms and living quarters for club members who desire to live at the club, and for guests having appropriate cards.

On the seventh floor there are also located the general offices of the club and the editorial department for "The Manufacturer."

On the eighth floor are located the general dining rooms, in which ladies are permitted to be present with members. There is also a wing of the dining room which can be cut off, making a large private dining room or hall for smaller

meetings, conferences, and the like. There is also a small private dining room used for a great many small business luncheons and dinners and also for small business meetings.

The ninth floor is entirely devoted to kitchens and accommodations for help, etc.

The tenth and top floor contains the main all-the-year-round dining room. This dining room also contains a wing which can be shut off and made into a separate room for large luncheons, dinners, and business meetings.

XIV. The regular celebrations, social activities, or general events of the Manufacturers' Club for members during the year are, in part, as follows:

On New Year's Day, the open house, music, decorations, and a free luncheon.

On March 23 the club anniversary (of the dedication of the new building in 1914), music and decorations through the day, and in the evening a smoker with vaudeville, or a special table d'hote dinner with entertainment.

Club dances on 3d Mondays in every month from November to May, inclusive.

Musicale for the ladies every 4th Monday at 2:30 p. m. from October to April, inclusive.

Club dinner sometimes two or three times a year for a guest of honor.

Occasionally other special club dinners, e. g., April 30, 1924, with an entertainer. Motion pictures are shown and a great many of them reveal the products of manufacturers; others on travel.

Children's dance on a Saturday afternoon in May.

Christmas entertainment annually for 2,500 poor children of Philadelphia.

Club election day, a vaudeville show if it is a national election.

Bowling alleys were provided in the clubhouse for the use of the club members and also for use in interclub bowling tournaments. These bowling alleys were in charge of the bowling committee. A pool and billiard room was also provided in the clubhouse and maintained under the supervision of the pool and billiard committee.

The club was also available and was utilized for weddings, wedding parties, receptions, birthday parties, and other private social functions for which persons in the city of Philadelphia, principally for club members, might desire to utilize the facilities of the clubhouse. The fees received by the club for such private social functions formed a portion of the club revenues.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff brings this suit to recover $22 paid to the collector of internal revenue at Philadelphia in 1924 and 1925 as taxes upon dues to the Manufacturers' Club of Philadelphia, the Commissioner of Internal Revenue having ruled that the social features of said club form a material purpose of the organization and that it is a social club within the meaning of the Federal revenue act in force at that time. The question in the case is whether this ruling was correct.

To set out all of the activities of the Manufacturers' Club would be to unduly extend this opinion, but a list of some of the most important features in a social way is, we think, sufficient for the decision of the case.

This club was incorporated in 1887 under the laws of the State of Pennsylvania. The act under which it was incorporated provides, among other things, for the creation of corporations "for the encouragement and protection of trade and commerce." Provision VI of this corporation act states the purpose of clubs organized thereunder to be for "The maintenance of a club for social enjoyments," and the charter provides that the purpose of the association is to maintain the club for social enjoyments, to bring the manufacturers of the city of Philadelphia and vicinity into more cordial and social relations, and to enable them to act unitedly in all affairs of interest to their industries. It appears, however, that the membership of the club is not confined to persons connected with the manufacturing industry.

The club occupies a ten-story and basement stone building, which cost approximately $2,700,000.

Opinion of the Court

In the basement of this building is a barber shop, Turkish bath room, bowling alley, pool and billiard room, and a large grillroom. On the first floor there is a large lobby and a large waiting room equipped with comfortable chairs and lounges, a clerk's office, telephone booths, and a small room used for quick lunch and refreshments. On the second floor there are directors' and committee rooms, a large library and reading room, and a large assembly room. On the third floor is an auditorium used for large meetings, conventions, lectures, entertainments, etc., which is available for private functions, and is rented to private parties for social purposes. The fourth, fifth, sixth, and seventh floors contain seventy-four rooms, principally used as bedrooms, suites of rooms, and living quarters for club members who desire to live at the club and guests having appropriate cards. On the eighth floor is the general dining room, in which ladies are permitted to be present with members. There is also a wing of the dining room which can be cut off, making a large private dining room for small meetings and conferences. The tenth and top floor contains the main all-the-year-round dining room.

A partial list of the celebrations, social activities, and special events for the entertainment of members is found in Finding XIV. It is too long for repetition in the opinion and includes a great variety of entertainments, such as dinners for guests of honor and dinners with entertainers, luncheons, smokers, dances, musicales, and motion pictures. Bowling alleys and a pool and billiard room were provided which were supervised by special committees. The bowling alleys were also used for interclub bowling tournaments. The facilities of the club were available and used for wedding parties, receptions, and other social functions which club members might desire. The fees received for such private functions formed a portion of the club revenue.

It is probable that there are few clubs of a purely social nature anywhere in this country that make such elaborate provisions for social enjoyments. It may be that the other activities of the club, which are shown in the findings of fact and which are also too numerous to be set out in the opinion, were more extensive than those of a social nature.

Syllabus

Among them was the publication of a journal known as "The Manufacturer," and while mostly devoted to business matters, it contained a department concerning the social life of the club. In a general way the activities of the club may be separated into three divisions: First, those connected with business, particularly in manufacturing lines; second, those of a civic nature, having for their object some public benefit; and third, those of a purely social nature. The social activities were so extensive as to make it clear that they were and are a material part of the activities of the club organization and not merely incidental to its main purpose. In such a case, under the regulations of the Treasury Department and the rulings of the Commissioner of Internal Revenue, the organization is a social club within the meaning of the law. We think this ruling is correct.

The petition must be dismissed. It is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

WORTHINGTON PUMP & MACHINERY CORPORATION v. THE UNITED STATES

[No. F-375. Decided October 8, 1928]

On the Proofs

Contracts; "unavoidable delays"; breach by Government; consideration for supplemental contract increasing price.—In a contract for the installation of a pumping plant it was provided that delays caused by acts of the Government would be regarded as "unavoidable delays," for which the contractor might have an extension of time. Owing to the failure of the Government to furnish a necessary pump-well structure within the agreed time the contractor had to suspend work. Before resuming work the price of labor increased and a supplemental contract was executed increasing the contract price to cover the excess cost. The contract construed, and *held*, (1) that the provision in regard to "unavoidable delays" meant that such delays would be considered unavoidable on the part of the contractor, (2) that the failure to deliver the pump-

well structure constituted a breach which furnished the basis for a valid consideration in the supplemental contract of detriment to the contractor and benefit to the Government, and (3), that the Government, by entering into and fulfilling the supplemental contract for increased price, placed upon the original contract a construction by which it is now bound. *Crook Co.* v. *United States*, 270 U. S. 4, distinguished.

The Reporter's statement of the case:

Mr. C. Neal Barney for the plaintiff.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Worthington Pump & Machinery Corporation, a Virginia corporation, duly entered into a formal written contract with the United States dated June 30, 1924, and known as Bureau of Supplies and Accounts contract No. 60798, a copy of which is attached to plaintiff's petition as "Exhibit A" and made a part hereof by reference. The plaintiff fully performed said contract and was entitled to receive from the United States under the terms of said contract and from appropriations available for the purpose the sum of $27,266.00 for the goods sold and delivered thereunder. The plaintiff has received on account of said sum $21,852.41 and there was due on December 26, 1924, and is due on account of said contract, the sum of $5,413.59, except in so far as the offsets, deductions, or counterclaims made by the United States under another contract referred to in Finding IV herein were justly and properly made.

II. The plaintiff duly entered into a formal written contract with the United States dated December 5, 1924, known as Bureau of Supplies and Accounts contract No. 62313, a copy of which is attached to plaintiff's petition as "Exhibit B" and made a part hereof by reference. The plaintiff fully performed said contract and was entitled to receive from the United States under the terms of said contract and from appropriations available for the purpose the sum

of $1,095.00 for goods sold and delivered thereunder. There was due on January 8, 1925, and is due on account of said contract the sum of $1,095.00 except in so far as the offsets, deductions, or counterclaims made by the United States under another contract referred to in Finding IV herein were justly and properly made.

III. The plaintiff made a proposal to furnish certain goods to the Treasury Department of the United States, Bureau of Engraving and Printing, dated June 18, 1924, and the same was duly accepted June 19, 1924. Copies of the offer and acceptance, forming the contract between the parties, are attached to plaintiff's petition as "Exhibit C" and made a part hereof by reference. The plaintiff fully performed said contract and was entitled to receive from the United States under the terms of said contract and from appropriations available for the purpose the sum of $31.50 for goods sold and delivered thereunder. There was due on September 30, 1924, and is due on account of said contract, the sum of $31.50, except in so far as the offsets, deductions, or counterclaims made by the United States under another contract referred to in Finding IV herein were justly and properly made.

IV. The plaintiff duly entered into a formal written contract with the United States dated June 20, 1917, and known as Navy Department, Bureau of Yards and Docks contract No. 2356. By the terms of said contract, among other items, the plaintiff agreed to furnish, deliver, and install in 547 calendar days from the date that a copy of the contract should be delivered to it, two complete dry-dock pumping plants, including the necessary accessories, such plants to be installed in the pump well of Dry Dock No. 3 at navy yard, Philadelphia, and pump well of Dry Dock No. 4 at the Norfolk Navy yard. The specifications attached to the contract contained, among others, the following provisions:

"8. *Time of commencement of work.*—The contractor shall commence work immediately after the delivery to him of a copy of the contract and continue without interruption unless otherwise directed by the Government.

"9. *Time of completion.*—Each bidder shall state the number of calendar days required to complete the work, counting from the date a copy of the signed contract is delivered to him.

"10. *Evaluation of bids.*—Bids will be evaluated on the basis of the agreed damages per day in each case where different times for completion are named by bidders, the shortest time being taken as the standard, and other bids increased at the per diem rate to cover the increased time required. Bidders are at liberty to submit as many bids as they desire, naming different periods of time for completion of the work.

"11. *Continuance of work after time.*—It is mutually understood and agreed that in the event of the work not being completed within the time allowed by the contract, said work shall continue and be carried on according to all the provisions of said contract, unless otherwise directed by the Government in writing, and said contract shall be and remain in full force and effect during the continuance and until the completion of said work, unless sooner revoked or annulled according to its terms: *Provided*, That neither an extension of the time beyond the date fixed for completion of said work nor the permitting or accepting of any part of the work after said date shall be deemed to be a waiver by the Government of its right to annul or terminate said contract for abandonment or failure to complete within the time specified or to impose and deduct damages as hereinafter provided.

"12. *Extension of time.*—For causes of the character hereinafter enumerated extensions of time for the completion of the work may be allowed. Should the contractor at any time consider that he is entitled to an extension of time for any cause, he must submit in writing to the officer in charge an application for such extension, stating therein the cause or causes of the alleged delay. The officer in charge will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for consideration and such action as the circumstances may warrant. The failure or neglect of the contractor to submit, as above provided, his claim for extension of time within 30 days after the happening of the cause or causes upon which his claim is predicated shall be deemed and construed as a waiver of all claim and right to an extension of time for the completion of the work on account of the alleged delay, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding.

Reporter's Statement of the Case

"13. *Damages for delay.*—In case the work is not completed within the time specified in the contract, or within such extension of the contract time as may be allowed, it is distinctly understood and agreed that deductions at the rate named in the specifications of the work shall be made as liquidated damages and not as penalty from the contract price for each and every calendar day after and exclusive of the date within which the completion was required, up to and including the date of completion, said sum being specifically agreed upon as a measure of damage to the government by reason of delay in the completion of the work; and the contractor agrees and consents that the contract price, reduced by the aggregate damages so deducted, shall be accepted in full satisfaction for all work done under the contract.

"14. *Unavoidable delays.*—Unavoidable delays are such as result from causes which are beyond the control of the contractor, such as acts of Providence, fortuitous events, inevitable accidents, abnormal conditions of weather or tides, or strikes of such scope and character as to interfere materially with the progress of the work. Delays caused by acts of the Government will be regarded as unavoidable delays. * * *

* * * * * * *

"17. *Changes.*—The Government reserves the right to make such changes in the contract, plans, and specifications as may be deemed necessary or advisable, and the contractor agrees to proceed with such changes as directed in writing by the Chief of the Bureau of Yards and Docks. The cost of said changes shall be estimated by the officer in charge, and, if less than $500, shall be ascertained by him. If the cost of said changes is $500 or more, as estimated by the officer in charge, the same shall be ascertained by a board of not less than three officers or other representatives of the Government. The cost of the changes as ascertained above, when approved by the Chief of the Bureau of Yards and Docks, shall be added to or deducted from the contract price, and the contractor agrees and consents that the contract price thus increased or decreased shall be accepted in full satisfaction for all work done under the contract: *Provided,* That the increased cost shall be the estimated actual cost to the contractor at the time of such estimate and that the decreased cost shall be the actual or market value at the time the contract was made, both plus a profit of 10 per cent."

A copy of the contract was delivered to the plaintiff on July 26, 1917. The contract as amended by the supplemental agreement hereinafter referred to was fully per-

Reporter's Statement of the Case

formed by the plaintiff, who was fully paid the contract price set forth in said contract and for changes authorized therein. These payments are not now in controversy between the parties, except the payment of $6,545.00 made by the United States to the plaintiff on or about August, 1922, under the terms of a formal written agreement duly entered into between the parties hereto on March 28, 1921, supplemental to said original contract of June 20, 1917, and known as Bureau of Yards and Docks Supplemental Agreement No. 2356–X. This supplemental agreement contained among others the following provisions:

"Whereas owing to the unreadiness of the pump-well structure of Dry Dock No. 3, at the Philadelphia Navy Yard, the installing of said pumping plant under contract No. 2356 was required to be postponed about two years from August, 1918, to July, 1920, as a result of which change the actual labor cost to the contractor of installing said plant has been increased; and

"Whereas the Government under date of July 12, 1920, agreed to revise the contract price to compensate the contractor for the proper increased labor cost of installing said plant:

"Now therefore, in consideration of the premises, it is mutually convenanted, promised, and agreed by and between the parties hereto, as follows:

"First. The Government will pay, and the contractor shall receive, in full satisfaction of the increase in cost to the contractor of erecting said pumping plant at the Philadelphia Navy Yard, resulting from the change in the time of installation, and in accordance with the report dated February 10, 1921, of a board appointed pursuant to paragraph 17 of the general provisions of said contract to ascertain the cost of said change, the sum of six thousand five hundred and forty-five dollars ($6,545.00), chargeable to appropriation No. 1219, 'Navy Yard, Philadelphia, Pa.,' subhead No. 214, 'Dry Dock, to Complete' (allotment No. 1219–214–9), said sum being additional to the amount stipulated in said contract and previous changes therein.

"Second. By reason of said change in time of installation, the time for the completion of the work at the navy yard, Philadelphia, Pennsylvania, is hereby extended to June 15, 1921.

"Third. Except as herein modified the said contract as heretofore duly modified shall remain in full force and effect."

This supplemental agreement was signed on behalf of the United States by C. W. Parks, Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Treasury.

V. The aforesaid supplemental agreement was entered into by the parties under the following circumstances:

The plaintiff was ready to proceed with the installation of said pumping plant at Philadelphia in accordance with the time requirement of the original contract, but the pump-well structure, to be furnished by the United States and prerequisite to the installation of the pumping plant, was not completed until after July, 1920, and the plaintiff because of this delay was directed by the United States, through the Chief of the Bureau of Yards and Docks of the Navy Department, on or about May 8, 1918, to cause the said pumping plant to be delivered at the yard and stored pending its installation, which the plaintiff did and thereupon suspended, until the pump-well structure should be ready, the installation required by the contract.

Before resuming work under the contract, the plaintiff requested revision of the contract price under the original contract, because of the increased cost to the plaintiff of executing the contract at a date so much later than the date agreed upon between the parties, and as recited in the supplemental agreement the Government under date of July 12, 1920, agreed to revise the contract price to compensate the contractor for the proper increased labor cost of installing said plant.

VI. Also, on July 12, 1920, the Bureau of Yards and Docks authorized the appointment of a board, which board subsequently proceeded to consider the claims made by the plaintiff for additional compensation for work under the contract for the pumping plant. The correspondence between the parties showed in substance that Rear Admiral Harris, a public-works officer, wrote that the bureau would consider "the recommendation of a board with a view to revising the contract by entering into a supplemental agreement" and would "consider making recommendation to the bureau that the supplemental agreement be drawn * * * to

cover the excess cost." The board which was appointed consisted of Rear Admiral Harris and two other officials of the Government, and it assessed the increased cost owing to the delay at $6,545 and recommended that a supplemental agreement be drawn increasing the contract price in that amount. Thereafter the supplemental agreement dated March 28, 1921, referred to in Finding IV, was executed by the parties, reciting that owing to the unreadiness of the pump-well structure the installation of the pumping plant was required to be postponed about two years, and increasing the consideration to be paid to the plaintiff under the original contract by $6,545, the amount which had been determined by the board of officers appointed under the provisions of paragraph 17 of the original contract to be the increased cost to the contractor resulting from the change in time of installation. The plaintiff completed the installation of the machinery as required in said contract as amended by said supplemental agreement, and the United States paid the plaintiff from an appropriation available for the purpose the amount due under the original contract, with certain extras not here in dispute, plus $6,545, the consideration named in said supplemental agreement, and in August, 1922, the plaintiff executed and delivered to the defendant a general release of all claims due upon the completion of the work.

VII. On or about November, 1924, the Comptroller General of the United States ruled that said payment of $6,545 was improperly made by the United States to the plaintiff, and the United States recouped the same by applying in satisfaction of said alleged overpayment the sums referred to in Findings I, II, and III herein, aggregating $6,540.09; together with the further sum of $4.91, which the parties hereto have been unable to identify and is not set up in the petition.

VIII. The United States is now withholding and retaining from the plaintiff, without its consent and against its will, the whole of said amount of $6,540.09.

The court decided that plaintiff was entitled to recover

Opinion of the Court

GREEN, *Judge*, delivered the opinion of the court:

The facts in this case are not in controversy. The defendant admits that the plaintiff is entitled to recover judgment as asked in the petition unless an offset claimed by it on account of what it alleges to be an improper payment to the plaintiff constitutes a just counterclaim.

It appears that in 1917 the plaintiff agreed to deliver and install for defendant two dry-dock pumping plants within a certain period. Plaintiff manufactured the pumps on time and was ready to install them in accordance with the contract when it was directed by the Government to suspend performance because the pump well to be furnished by the Government was not ready. The pumps were accordingly stored until the well was ready, which was about two years after the contract date for installation thereof.

Before resuming work on this contract, the plaintiff requested revision of the contract price because of the increased cost of labor caused by the delay resulting from the pump well not being in condition to receive the equipment. After some correspondence, on July 12, 1920, and before the work was recommenced, the defendant agreed to revise the contract price to compensate the contractor for the proper increased labor cost of installing the plant. Subsequently a board was appointed to consider the claims made by the plaintiff for additional compensation, and after such consideration it assessed the increased cost owing to the delay at $6,545, and recommended that a supplemental agreement be drawn increasing the contract price in that amount. Thereafter a supplemental agreement dated March 28, 1921, the material portion of which is set out in Finding IV, was executed by the parties; and among other things it was provided therein that the Government would pay in full satisfaction of the increase in cost to the contractor resulting from the change in the time of installation, the said sum of $6,545. Plaintiff completed the work and received said sum, together with the amount provided under the original contract. The Comptroller General having ruled that the supplemental contract was without consideration and void, the defendant now seeks to set off the amount

paid under the supplemental contract against the claim made in the petition.

The issue in the case is whether the supplemental contract was valid. The defendant claims that its agents had no authority to make such an agreement and that it received no consideration therefor.

In support of defendant's counterclaim, its counsel call attention to the provisions of the original contract with reference to delays in the work and damages which may be allowed therefor. A careful reading of the contract convinces us that all these provisions were made for the purpose of defining under what circumstances the plaintiff would, and under what it would not, be held responsible for delays in the prosecution of the work. Under certain circumstances the defendant might cancel the contract; under others a sum was to be deducted as damages sustained by the Government; under others an extension of time might be granted to the contractor. The portion of the contract that is material to the decision of this case is set out in Finding IV. It will be observed that it provides for the time of commencing and the time of completion of work, for the continuance of work after time, and for extension of time to the contractor; also for delays in completion, the sum deducted for which "being specifically agreed upon as a measure of damage to the Government by reason of delay in the completion of the work," and that the contractor agrees that the contract price shall be reduced by such damages. There is also a provision with reference to unavoidable delay which is said to be such as result from causes which are beyond the control of the contractor. Counsel for defendant call attention to a provision in the same paragraph that "Delays caused by acts of the Government will be regarded as unavoidable delays," but the connection, we think, shows that what is meant thereby is that such delays would be considered unavoidable on the part of the contractor. Any other construction would be extremely unreasonable. An unlimited provision that delays caused by the Government, no matter how unreasonable, unnecessary, and even if willful and intentional, were

to be regarded as unavoidable on its part is something that the court can hardly believe the parties intended unless corroborated by further evidence as to the actions of the parties. But the evidence shows very plainly by the execution of the supplemental contract that this provision was inserted for the benefit of the plaintiff and not for the benefit of the defendant, and its real meaning is, we think, merely that the plaintiff was not to be mulcted in damages by reason of delays caused by the defendant.

When plaintiff, before proceeding with the installation, asked for a change in the contract to cover the increased cost of labor caused by the delay, the defendant did not dispute its obligation to so do. It agreed to pay the proper amount of the increase, convened a board in the manner provided in paragraph 17 of the contract to estimate and check the increased cost because of the change of the installation date, and finally not only executed the supplemental contract but paid the plaintiff the amount in controversy herein and accepted a final release.

By all of these acts the defendant placed a construction upon the contract in accordance with which the plaintiff proceeded to complete the work. It is now bound by its own construction. See *Metal Products Co.* v. *United States*, 61 C. Cls. 997, 1013; *Douglas Traction & Light Co.* v. *United States*, 60 C. Cls. 268; *District of Columbia* v. *Gallaher*, 124 U. S. 505.

The actions of both parties showed unmistakably what their intentions were when the contract was executed.

We think also there was a breach of the original contract on the part of the Government. True, the Government did not expressly agree to have the pump well ready by any fixed time, but the contract provided that the plaintiff should install the pumps at a fixed date, and it could not do so unless the pump well was ready some time in advance of the date so fixed. There was an implied contract on the part of the Government that the well would be ready, and the agreement of the plaintiff to go on and complete the contract at a future date at an increased cost for labor and other matters furnished a consideration for the supple-

mental agreement in the way of detriment to plaintiff and benefit to defendant.

The supplemental contract recited that the time of installing the pumping plant under the original agreement had been changed and that "the time for the completion of the work * * * is hereby extended to June 15, 1921." Obviously, this was in change in the original contract as to specifications. The case of *H. E. Crook Co.*, 270 U. S. 4, is cited on behalf of defendant, but there are several important differences between the facts in that case and those in the case at bar which are noted in the opinion of the Supreme Court. There was the same kind of a provision with reference to delays on the part of the Government being regarded as unavoidable, but the court says this was "probably inserted primarily for the contractor's benefit as a ground for extension of time," although it also says that this provision "is not without a bearing on what the contract bound the Government to do." But in particular and as decisive of the case, the Supreme Court says: "The plaintiff agreed to accept in full satisfaction for all work done under the contract the contract price, reduced by damages deducted for his delays and increased or reduced by the price of changes, as fixed by the Chief of the Bureau of Yards and Docks." The provision of the contract is the same as in the instant case, but in the *Crook case* the Chief of the Bureau of Yards and Docks did not increase the contract price on account of changes; in the case at bar it appears without conflict that he did fix the increase after a board had been appointed to examine and ascertain the proper amount, and signed an agreement to pay the sum so fixed.

The case of *E. W. Bliss Co.* v. *United States*, 61 C. Cls. 777, was one in which the plaintiff sought to recover on account of increased cost in wages caused by acts of the Government. Recovery was denied by this court, but the Supreme Court in reversing this decision entered an order holding that there was authority to make a supplemental contract and that a consideration existed in the way of detriment to the plaintiff and benefit to the defendant (275

U. S. 509). The case is not really as strong for the plaintiff as the one at bar because there was no breach of the contract on the part of the Government. But in both cases the acts of the Government caused an increased expense in completing the work above that contemplated by the contract. In the *Bliss case* no supplemental contract was made because the Secretary of the Navy followed the holding of the Comptroller General to the effect that such a contract would be unauthorized and void. In this case the supplemental contract was executed and carried out. In our opinion, every reason that would support a recovery in the *Bliss case* applies herein with the same or greater force.

It follows that the plaintiff is entitled to recover the amount wrongfully withheld from it by the defendant, to wit, $6,540.09, and judgment will be entered accordingly.

SINNOTT, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

GRAHAM, *Judge*, took no part in the decision of this case.

ROBERT E. SAFFORD AND WILLIAM MASON SMITH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HARRIET NYE TOWNE, DECEASED, v. THE UNITED STATES

[No. H-107. Decided October 8, 1928]

On the Proofs

Estate-transfer tax; gift inter vivos; conveyance in contemplation of death.—Where a donor was not actuated by a consideration of death and her motive in making the transfer did not arise therefrom, her gift was not in contemplation of death, within the meaning of the revenue acts of 1918 or 1921 providing for the estate-transfer tax.

The Reporter's statement of the case:

Mr. George W. Martin for the plaintiffs. *Emmet, Marvin & Martin* were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Harriet Nye Towne died January 11, 1923, at Chillicothe, Ohio, being at that time eighty-eight years of age. She left a will by virtue of which Robert E. Safford and William Mason Smith, residents of the State of New York, were appointed executors, who duly qualified and as such are the plaintiffs herein.

II. The decedent had no issue and lived with two nieces, Eudora Nye and Virginia S. Nye.

III. On April 9, 1921, the decedent transferred as gifts to the two nieces with whom she lived, Eudora Nye and Virginia S. Nye, to her nephew, Joseph F. Nye, and to her husband's nephew, Robert E. Safford, certain securities having a value at the time of the death of the decedent of $442,-501.90. Her total estate, including these gifts, had a value at the time of her death of $2,320,110.56.

IV. Prior to making said gifts and on May 31, 1919, the decedent made a will by which she bequeathed to the same parties to whom she made the gifts specified in the preceding finding each the sum of $100,000. Some time later, her attorney, William Mason Smith, one of the executors and plaintiffs herein, advised her that because of unsettled conditions in Mexico, where much of her property was located, there was a possibility her estate might not be sufficient to pay all of the legacies above and recommended making the gifts above referred to. As a result of this advice the decedent made the gifts in question, and with reference to two of the beneficiaries stated in a letter that she wished to have them paid "at the present time" instead of waiting for her death. At the same time she executed a codicil to her will revoking the legacies made by her will to the same parties.

V. At the time when the decedent made the said gifts, she walked and rode in a car, ate substantial meals, dressed and waited upon herself, was cheerful, active for a person of her age, and her acts and conduct were not such as to indicate that she had any fear or expectation of impending death.

VI. Prior to making these gifts the decedent had been treated by the family doctor for slight ailments, and in

October, 1921, she consulted the family physician with reference to a discharge from her breast, which subsequently healed up after X-ray treatment. Later, and about August, 1922, she sustained a fracture of the hip from a cause not shown in the evidence. Her death was caused by confinement to bed by reason of this fracture and the resulting exhaustion.

VII. On January 10, 1924, the plaintiffs filed with the collector of internal revenue for the eleventh district of Ohio, at Columbus, Ohio, a Federal estate-tax return upon Treasury Department Form No. 706, showing a tax of $127,765.05, which tax was paid by plaintiffs. The transfers described in Finding III above were set out in Schedule E of said return; but the value thereof was not included in said return as a part of decedent's gross estate.

VIII. Upon audit and review the Commissioner of Internal Revenue determined that the said gifts should be included in the gross estate of the decedent and assessed an additional tax by reason thereof amounting to $56,134.98, which the plaintiffs paid under protest; and on November 10, 1926, filed a claim for the refund of the said tax payment, which was by the commissioner refused and denied.

The court decided that plaintiffs were entitled to recover $56,134.98, with interest from November 5, 1926.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiffs in this case seek to obtain a refund of taxes paid by them upon the amount of certain gifts made by the decedent, of whose estate they are executors. The gifts were made within two years prior to the death of the decedent. There is no claim that they were made as a substitute for a testamentary devise in order to avoid the estate tax, but it is urged on behalf of the defendant that they were made "in contemplation of death" within the meaning of the statute, and the evidence shows that the commissioner included the value of the gifts in the gross estate. The plaintiffs paid under protest the additional tax assessed by reason of such inclusion, which was $56,134.98, and claiming that is was unlawfully assessed ask judgment for that amount.

Opinion of the Court

Both the revenue acts of 1918, 40 Stat. 1057, and 1921, 42 Stat. 227, provide for the inclusion in the gross estate of a decedent of any property of which he has made a transfer in contemplation of death, except in a case of a bona fide sale for a fair consideration, and also that—

"Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

It is contended on behalf of plaintiffs, for certain reasons which we need not set out here, that the statute of 1921, passed after the date when the gifts in question were made, applies to this case, and when so applied is unconstitutional and void. By reason of the views hereinafter set forth it is not necessary to express an opinion on the points involved in this claim.

It is not easy to define the expression "in contemplation of death" as used in the statute and the authorities are not uniform as to its proper construction. In *Meyer* v. *United States*, 60 C. Cls. 474, 482, it is said:

"A review of the authorities is scarcely necessary to sustain the proposition that the contemplation of death referred to in the statute is not that contemplation of death which must be present with all of us, mindful of its certainty at some time, we know not when, but it is that state of mind which by reason of advanced age, serious illness, or other producing cause induces the conviction that death in the near future is to be anticipated. If it be said that there need not be a conviction that death is imminent, there must at least be a belief that it is to be expected in the very near future rather than in the usual course of events. And in this state of mind, in this belief in the near approach of death, must be found the motive for the conveyance if it is properly to be characterized as made in contemplation of death."

If the rule laid down in the case just cited is applied, we think it clear that the transfer in question can not be held to have been made in contemplation of death. The evidence fails to show that the decedent had any reason to expect

death in the very near future. There was nothing in her demeanor or her activities to indicate such an expectation. On the contrary, the circumstances surrounding the execution of the transfers in question tend to show that she did not expect death in the near future. The evidence shows that in the first instance the gifts were actuated by the advice of her attorney who called attention to the condition of her property in Mexico and suggested that she make some provision or codicil so as to make sure that the persons who were nearest to her received the full amount of the legacies in the event that upon her death her estate might not be equal to meet all of the legacies, and that her purpose was also to gratify a desire that the donees should receive the money at once in order that they could enter upon the enjoyment of it.

There is, upon the other side, the fact of her advanced age with a comparatively short expectancy of life and also the fact that her hands shook, especially when writing, and not long after the execution of the transfers she had a discharge from one of her breasts which, however, subsequently healed. But advanced age alone is not sufficient to show that a transfer was made in contemplation of death, and none of the other matters are sufficient to show at the time of the transfers any belief on her part in the near approach of death. The evidence shows that she was cheerful, active for a person of her age, and in other respects her acts and conduct were not such as to indicate that she had any fear or expectation of impending death.

The writer of this opinion, however, thinks that the construction of the words "in contemplation of death" set out in the opinion in the *Meyer case* is altogether too narrow. "Contemplation" may mean "expectation," but this meaning can not be applied without qualifications, as the opinion in that case shows. In common use "contemplation" means "consideration with attention" and making a transfer "in contemplation of death" would, as the writer thinks, mean that the transfer was actuated or brought about by a consideration of death with attention. There would seem to be no reason why, if Congress meant "expectation" by the use of the word "contemplation," it should not have used the

former word instead of another which might or might not have that meaning.

If the construction last above set forth should be applied, the decision becomes more doubtful, but on the whole it would seem that the result must be the same. While in one sense death was considered when the testator concluded that she wanted the beneficiaries to have the property at once instead of at her death in the indefinite future, she was not actuated by a consideration of death nor did her motive in making the transfer arise therefrom. The controlling influence seems to have been the advice of her attorney with reference to the condition of her estate and a desire that the donees should immediately receive the benefits of her bounty without being obliged to wait for her death.

The statute creates a presumption, but that presumption may be overcome by credible evidence to the contrary. This, we think, has been done. It follows that plaintiffs are entitled to recover the amount of additional tax assessed on account of the gifts in question, and judgment will be rendered accordingly. It is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur in the result.

GRAHAM, *Judge*, took no part in the decision of this case.

JACOB MANOWITZ v. THE UNITED STATES

[No. D-888. Decided October 15, 1928]

On the Proofs

Contract of purchase; deficiency in delivery; lack of evidence as to market price at time of breach.—For the breach of a contract of sale giving the purchaser the right to supply a deficiency by procurement in open market, or otherwise, the amount of damages is measured by the difference between the contract price and the market price on the date for delivery or, in the absence of evidence of market price at that time, at a reasonable time thereafter.

The Reporter's statement of the case:

Mr. Frank E. Scott for the plaintiff.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

Messrs. Joseph Henry Cohen and *Alexander Holtzoff* were on the briefs.

The court made special findings of fact, as follows:

I. The plaintiff, Jacob Manowitz, is a citizen of the United States and has always borne true allegiance to the United States. During the years 1917, 1918, and 1919 he was engaged in the business of manufacturing coat fronts and of purchasing, importing, and selling jute, linen, and cotton fabrics. His principal place of business was in New York City.

II. On September 4, 1918, the plaintiff entered into a written contract No. 10069 with Captain John R. Holt, Quartermaster Corps, U. S. A., an officer with authority to contract for and in behalf of the United States, whereby the plaintiff agreed to furnish and deliver to the United States 320,000 yards (more or less) of jute canvas padding as per sample No. 112½ submitted, at a net price of $0.27 per yard, and at a total price of $86,400.00 (more or less) as provided for in Schedule A, attached to the contract. A copy of Schedule A is annexed to the amended petition and is made a part hereof by reference.

III. During the months of October, November, and December, 1918, the plaintiff delivered 351,870 yards of the said material to the defendant under contract No. 10069, and the material was accepted and retained by the defendant. The plaintiff was paid for 320,000 yards at the contract rate of $0.27 per yard in the aggregate sum of $86,400.00, but has not been paid for the 31,870 yards over-delivered, for which the plaintiff makes claim at the contract rate of $0.27 per yard in the total amount of $8,604.90. The fair market price of the material at the time of its delivery was not less than $0.27 per yard.

The plaintiff is the sole owner of the claim embraced in this suit, and has made no assignment or transfer of the said claim or any part thereof or interest therein.

Counterclaim

IV. Under date of October 18, 1917, the Philadelphia depot of the Quartermaster Corps, United States Army, sent

a letter to the plaintiff awarding a contract to the plaintiff for jute canvas padding, which letter is as follows:

No. 423.3–135—Pur.

From: Depot Quartermaster.
To: Jacob Manowitz, 123–125 Bleecker St., New York City.
Subject: Award of contract.

1. In accordance with your offer, contract is awarded you for furnishing and delivering *at this depot 22″ jute canvas padding* as per submitted samples.

Sample	Approx. quantity (yards)	Price per yd.	Delivery (yd.)			
			At once	Nov.	Dec.	Jan., 1918
9270	112,000	$0.17½	32,000	32,000	16,000	32,000
112½	63,600	.18	41,600	----------	----------	22,000
816	64,000	.18	----------	----------	----------	64,000
814	96,000	.17	----------	----------	32,000	64,000
612	64,000	.18	----------	----------	32,000	32,000
20–J	112,000	.17	----------	----------	32,000	80,000
817	32,000	.16	32,000	----------	----------	----------
508	112,000	.1875	20,000	----------	32,000	60,000
	655,600	----------	125,600	32,000	144,000	354,000

2. The contract will provide that if the contracting officer directs that these goods be delivered at the New York depot, the cost of transportation by freight and the drayage charges are to be deducted from the bill for payment.

3. Contract will be dated October 19th, 1917, and numbered "*1430*."

4. Bond in the amount of $12,000.00 will be required for the faithful fulfillment of this contract, and you are requested to advise this office the name of a qualified surety company or two individuals who will join in this bond with you.

5. Please acknowledge receipt.

(Signed) M. GRAY ZALINSKI,
Colonel Q. M. Corps, D. Q. M.

To that letter the plaintiff on October 25, 1917, replied as follows:

DEPOT QUARTERMASTER,
2620 Gray's Ferry Road, Philadelphia, Pa.

GENTLEMEN: Referring to Pur. 423.3—145, contract No. "1430," we beg to acknowledge same as follows: 22″ jute canvas padding, as per submitted samples.

Sample	Approx. quantity (yards)	Price per yd.	At once	Nov.	Dec.	Jan., 1918
9270	112,000	$0.17½	32,000	32,000	16,000	32,000
112½	63,600	.18	41,600			22,000
816	64,000	.18				64,000
814	96,000	.17			32,000	64,000
612	64,000	.18			32,000	32,000
20–J	112,000	.17			32,000	80,000
817	32,000	.16	32,000			
508	112,000	.1875	20,000		32,000	60,000
	655,600		125,600	32,000	144,000	354,000

We are furnishing bond from the United States Guarantee Co. for $12,000.00.

Kindly note that we are not responsible for any delay in shipment of this contract, owing to the conditions of transportation caused by the war.

Kindly send us contract for the above as soon as possible, and oblige.

Very truly yours, (Signed) MANOWITZ.

V. Following the said interchange of letters and on or about the 17th of November, 1917, the plaintiff entered into a written contract, No. 1430, dated as of October 19, 1917, with the United States. The said contract was executed by Capt. E. J. Gallagher, jr., for M. Gray Zalinski, colonel, Quartermaster Corps, U. S. A., who had authority to execute and sign said contract for and in behalf of the United States. By its terms the contract expired January 31, 1918, and provided for the delivery by the plaintiff to the defendant of 655,600 yards of 22″ jute canvas padding at the prices therein specified prior to the said date. The materials to be furnished were to be "like and equal in all respects" to the samples submitted by the plaintiff. Those portions of the contract which are material for the purposes of these findings are as follows:

1430

Between Colonel M. Gray Zalinski, Q. M. Corps, U. S. Army, and Jacob Manowitz.
For furnishing and delivering 22″ jute canvas padding.
At Philadelphia depot, Q. M. Corps, U. S. Army.
Date contract, October 19, 1917. Contract expires January 31, 1918.
Sureties, United States Guarantee Company, $12,000.00.
Appropriation and amount—S. S. & T. Q. M. C., 1918—approx. $115,568.00.

Reporter's Statement of the Case

It is understood and agreed that if the contracting officer directs that these goods be delivered at the New York depot, the cost of transportation by freight to the Philadelphia, Pa., depot, and the drayage charges are to be deducted from the bill for payment.

These articles of agreement entered into this 19th day of October, nineteen hundred and seventeen, between Colonel M. Gray Zalinski, Quartermaster Corps, United States Army, of the first part, for and in behalf of the United States of America, and Jacob Manowitz, in the county of New York and State of New York (hereinafter designated as contractor), of the second part: Witness, that the said parties do hereby mutually covenant and agree to and with each other (referring to any advertisement, circular to bidders, and specifications hereto attached or referred to herein, or pertaining thereto, and to samples referred to herein or in said advertisement, circular to bidders, or specifications, which, so far as they are applicable, form a part of this contract) as follows:

1. That the said contractor shall furnish and deliver the following-named supplies in the manner, at the rates or prices, at the place or places named herein, at the time or times stated, and for such supplies so delivered and accepted the said contractor shall receive the prices as specified below; and that the supplies so delivered shall be like and equal in all respects to the samples submitted by contractor, and now on file in the office of the depot quartermaster at Philadelphia, Pa., and each piece or article, or package thereof, as the case may be, shall be marked with the contractor's name, date of the contract, and depot of delivery, as directed by the receiving officer, if practicable, viz:

To be delivered at the depot of the Quartermaster Corps, U. S. Army, Philadelphia, Pa.: 22″ jute canvas padding—approximately:

Sample	Quantity	Price per yard	Delivery (yards)			
			At once	Nov.	Dec., 1917	Jan., 1918
9270	112,000	$0.17½	32,000	32,000	16,000	32,000
112½	63,600	.18	41,600			22,000
816	64,000	.18				64,000
814	96,000	.17			32,000	64,000
612	64,000	.18			32,000	32,000
20 J	112,000	.17			32,000	80,000
817	32,000	.16	32,000			
508	112,000	.1875	20,000		32,000	60,000
Total	655,600		125,600	32,000	144,000	354,000

* * * * * * *

Reporter's Statement of the Case

4. That it is mutually agreed and understood between the said parties that the separate quantities of supplies to be delivered under this contract may be increased or decreased, at the option of the United States, at any time or times during the continuance of the contract, not exceeding the percentages thereof indicated in the circular to bidders hereto attached; and if no percentage of increase or decrease is named in the circular to bidders, this contract will not be subject to increase or decrease. In case of change in the quantity required by increase or decrease, notice in writing of such change will be served upon the contractor by the contracting officers.

5. That for and in consideration of the faithful performance of the stipulation of this contract, the contractor shall be paid, at the office of the contracting officer, or by a disbursing officer designated by him to make payments, the prices stipulated in this contract for those supplies delivered and accepted; and, except as otherwise provided, payments will be made as soon after the acceptance of each delivery as is practicable and funds on hand for the purpose will admit.

* * * * * * *

8. That in the case of the failure of the contractor to perform any part of this contract the party of the first part, or his successor, shall have the right to supply the deficiency by procurement in open market, or otherwise, purchasing any of the supplies so required at such place as he may elect, with a view of obtaining the same promptly and at the same time endeavoring to secure fair and reasonable prices (the articles procured to be the kind herein specified, as near as practicable) at the expense of the contractor; and in case failure shall occur prior to the time fixed for performance of all parts of the contract the right is hereby reserved to the United States to elect whether the contractor shall be permitted to continue performance as to such remaining part (deficiency by reason of any further failure to be supplied as above) or whether the entire unperformed part shall be procured at the expense of the contract. In event, however, of the granting of additional time for performance, the cost of inspection and other expenses and damages to the United States over what would have been incurred had performance been accomplished by the time originally fixed therefor, if any, except in so far as the same may arise from delays for which the United States is responsible, as determined in each of these particulars by the officer in charge or higher authority, shall be charged to the contractor and may be deducted from any money due or to become due said

contractor from the United States: *Provided*, That where additional time has been granted the United States shall also have the right to cause the remaining part of the contract, or any portion thereof, to be taken from the contractor whenever, in the opinion of the officer in charge, reasonable and satisfactory progress is not being made, and to secure completion at the expense of the contractor, including charges as above on account of delays.

* * * * * * *

In witness whereof, the parties aforesaid have hereunto placed their hands the date first hereinbefore written, and the contracting officer hereby certifies that if the contractor is a corporation that said officer has satisfied himself of the authority of the person signing the contractor's name to bind the contractor and has waived the requirements of Army Regulations as to the filing of written evidence of said authority.

M. GRAY ZALINSKI,
Colonel, Quartermaster Corps, U. S. A.
By (Sgd.) E. J. GALLAGHER, Jr.,
Captain, Q. M., U. S. A.
(Sgd.) JACOB MANOWITZ.

Witnesses:
(Sgd.) L. H. ALRONSKI.
(Sgd.) SAMUEL E. DENZER.

Approved by the Quartermaster General of the Army—a true copy.

WM. L. O'BRIEN,
2nd Lt., Q. M. Corps.

VI. On and between October 19, 1917, and January 23, 1918, the plaintiff delivered to the defendant a total of 177,258½ yards of jute canvas under contract No. 1430 and received payment therefor in accordance with the terms of the said contract.

VII. A shipment of 40,796 yards of jute canvas of sample No. 9270 and 28,519 yards of sample No. 816 which were being imported by the plaintiff from Scotland for delivery to the defendant under contract No. 1430 was lost at sea with the sinking of the S. S. "Tiberia." Thereafter the plaintiff and Thomas H. Slavens, colonel, Quartermaster Corps, U. S. A., by John B. Holt, captain, Quartermaster Reserve Corps, entered into a supplemental contract, No. 4025, reducing the quantity required to be delivered under

contract No. 1430 by 69,315 yards. This supplemental contract reads as follows:

Supplementary contract No. 4025 (Phila. #1430)

Whereas on October 19, 1917, a contract was entered into between the United States, represented by Colonel M. Gray Zalinski, Quartermaster Corps, U. S. Army, and Jacob Manowitz, of New York City, New York (hereinafter referred to as contractor), for furnishing and delivering to the Quartermaster Corps certain quantities of 22-inch jute canvas padding, as per samples and at prices stipulated therein; and

Whereas it appears that owing to the sinking at sea of the S. S. "Tiberia," on which vessel the contractor was importing sixty-nine thousand three hundred fifteen (69,315) yards of the 22-inch jute canvas padding contracted for, the contractor is unable to deliver that quantity of the said material;

Now, therefore, it is hereby agreed between the parties hereto that the quantity to be delivered under the said contract shall be reduced by sixty-nine thousand three hundred fifteen (69,315) yards, as follows:

Style #9270—22″ jute padding—by 40,796 yards @ \$0.17½ per yard.

Style #816—22″ jute padding—by 28,519 yards @ \$0.18 per yard.

All other terms and conditions of the said original contract shall remain in full force and effect.

Witness our hands this thirty-first day of January, 1918.

THOMAS H. SLAVENS,
Colonel, Quartermaster Corps, U. S. A.

Witnesses:

R. B. DONNELL as to

By JOHN B. HOLT,
Captain, Quartermaster R. C.

CHARLOTTE CHIRLOP as to

JACOB MANOWITZ.

The undersigned sureties to the bond pertaining to the above-named original contract assent to the foregoing modifications thereof, and hereby stipulate that said bond shall be construed to apply accordingly.

Witness our hands and seal this 31st day of January, 1918.

UNITED STATES GUARANTEE COMPANY,
DANIEL J. TAMPKINS, *President.*

Witness:

WARD E. FLAXINGTON,
Assistant Secretary,
(Witness as to Daniel J. Tampkins.)

Reporter's Statement of the Case

VIII. There remained undelivered on January 31, 1918, an aggregate of 409,026½ yards of jute canvas under contract No. 1430, a summary of which is as follows:

Sample	Price per yard	Yards ordered	Yards delivered	Reduction by sup. cont.	Yards undelivered
9270	$0.17½	112,000	2,264	40,796	68,940
112½	.18	63,600	60,659		2,941
816	.18	64,000	35,322½	28,519	158½
814	.17	96,000			96,000
612	.18	64,000			64,000
20 J	.17	112,000	16,000		96,000
817	.16	32,000	25,749½		6,250½
508	.1875	112,000	37,263½		74,736½
Total		655,600	177,258½	69,315	409,026½

IX. The plaintiff had orders and contracts with Messrs. Thomas Bonar & Company, Jaffe Bros. and Godfrey & Company, and William Smith and others, all of Dundee, Scotland, for merchandise to be imported for the fulfillment of contract No. 1430.

On November 23, 1917, the British Government, through the Army Council, issued an order designated as "The Jute (Export) Order," which was as follows:

THE JUTE (EXPORT) ORDER, 1917, DATED NOVEMBER 23, 1917, MADE BY THE ARMY COUNCIL

In pursuance of the powers conferred upon them by the Defence of the Realm Regulations, the Army Council hereby order as follows:

1. On any sale of any article or material manufactured or to be manufactured wholly or partly from jute, it shall be the duty of the vendor either to obtain from the purchaser a guaranty in writing that such article or material will not be exported from the United Kingdom, or if it is the intention of the purchaser that such article or material shall be exported from the United Kingdom, to obtain a permit issued by or on behalf of the Director of Raw Materials authorizing the sale or manufacture as the case may be of such article or material as aforesaid.

2. No person shall sell or deliver any article or material of the description aforesaid for exportation from the United Kingdom without a permit issued by or on behalf of the Director of Raw Materials.

3. For the purposes hereof the expression "article or material" shall be deemed to include yarns.

4. This order may be cited as The Jute (Export) Order, 1917.

By order of the Army Council.

R. H. BRADE.

(The above order was published in the London Gazette, November 27th, 1917.)

X. Following the issuance of that order, the plaintiff was advised by the manufacturers in Scotland that deliveries of the plaintiff's orders would be delayed for an indefinite period. There then followed a voluminous amount of correspondence between the plaintiff and the War Department, the foreign manufacturers and exporters and the War Trade Board.

The Philadelphia depot of the Quartermaster Corps made repeated demands upon the plaintiff to complete the performance of contract No. 1430.

Late in December of that year some shipments were received, and plaintiff thereupon applied for and on January 2, 1919, received requisition No. 58841 from the raw materials and manufacturing department, quartermaster depot, city of New York, authorizing the delivery of 49,008½ yards of material on contract No. 1430, and on January 4, 1919, received req. No. 58864 for 57,840 yards. The plaintiff promptly delivered four bales and one case to apply on the first requisition and six bales to apply on the second one, approximately in all about 60,000 yards, to the New York depot. On January 17, 1919, the material was returned to the plaintiff by the zone supply officer, New York City, with the following termination notice:

JANUARY 17, 1919.

ZONE SUPPLY OFFICER, *New York City.*
JACOB MANOWITZ, *16th St. and Fifth Ave., New York City.*

Termination of contract #1430 10/19/17

1. You are hereby notified that this contract has been terminated and no material will be accepted by the Government on this contract. Our records show that this contract was originally made for 655,600 yards of 22-inch jute canvas

padding, which contract was later reduced by 69,315 yards owing to the loss at sea of a shipment of material which you intended to apply on this contract, leaving the total contractual amount 586,285 yards.

2. As this contract required deliveries previous to January 31, 1918, and no material had been delivered or offered for delivery previous to that date, the same has expired by limitation and we have no authority to accept this material. In consequence of same, the above is hereby terminated, as above stated.

3. We are returning to you a delivery of 14 bales, one case, made on our requisition No. 58841 of January 2nd, and a delivery of 6 bales made on requisition No. 58864, which were issued through error.

4. In replying, quote the complete file reference as indicated at the head of this letter, thereby facilitating action by placing it in the proper channels for prompt attention.

By authority of the zone supply officer, Clothing & Equipage Division Inspection Branch.

STUART F. LOUCHHEIM,
Captain Quartermaster Corps, Officer in Charge.
By E. W. SARGENT,
In Charge of Textile Inspection.

This termination notice ended the transactions with respect to contract No. 1430, except that the plaintiff subsequently filed a claim for compensation for the termination of the contract before the War Claims Board under the Dent Act. The claim was disallowed.

XI. On May 6, 1918, the Quartermaster Corps, New York depot, made a contract, #2823–N, with plaintiff for delivery within 8 weeks to the New York depot of said corps approximately 200,000 yards of jute canvas padding, 22″ as per submitted sample #46, at the price of $0.31 per yard.

The contractor duly delivered 206,134 yards of the material called for by said contract and received final payment in full settlement therefor by public voucher #3493, dated Oct. 7, 1918, in the sum of $1,901.54, containing the following certificate: "Refund of amount withheld on payment of voucher #9018, Sept., 1918, Accts. of Capt. C. H. Wilson, Q. M. C., said amount covering excess delivery, under contract of padding, canvas, jute, 6,134 yds."

XII. On May 7, 1918, Quartermaster Corps made a contract, #2826–N, with the plaintiff for the delivery within eight weeks of "approximately 300,000 yards (100 bales) 22″ jute canvas padding as per submitted sample #1126," at the price of $0.31 per yard—delivery to be made at the New York depot of said corps.

The plaintiff duly delivered 306,707 yards of said material under this contract and received final payment and settlement therefor by public vouchers #1038 and #3740. In voucher #1038 it is certified on behalf of the War Department: "I certify that deliveries under the above contract have been completed, and that the terms of the contract have been complied with—William M. Baker; 2nd Lt., Q. M. C."—and in voucher #3740 it is certified: "Refund of amount withheld on payment of voucher #1038, Nov., 1918, Accts. of Capt. C. H. Wilson, Q. M. C., said amount covering excess delivery under said contract of padding, canvas, jute. 22″, 6,707 yards, 31 cents, $2,079.17, contract #2826–N, May 7, 1918."

XIII. On July 1, 1918, the Quartermaster Corps made a contract, #793, order 32, with plaintiff for delivery on or before July 31, 1918, to the depot quartermaster, New York City, "approximately 100,000 yards, cloth, padding, canvas, jute, 22″ width, imported as per samples #56, #9270, or #612, bought finished at thirty-two cents ($0.32) per yard."

The plaintiff duly delivered to the Quartermaster Corps 113,383 yards of said material and received final payment therefor by public vouchers #8195 and 836. In voucher #8195 it is certified on behalf of the Quartermaster Corps as follows: "I certify that deliveries under the above contract have been completed and the terms of the contract have been complied with, Allen Dezouche, 2nd Lt. Q. M. C." And further it is certified in voucher #736: "Refund of amount withheld on payment of voucher #8195, Dec., 1918, Accts. Capt. C. H. Wilson, Q. M. C., said amount covering excess delivery under contract of padding, canvas, jute—13,383 yds. 32¢, $4,282.56, S. F. contract #793, dated July 1, 1918."

XIV. On August 13, 1918, the Quartermaster Corps entered into a contract #1001 (order 2–2539) with plaintiff

for delivery to the depot quartermaster, New York, "90,000 yds. (approx.) cloth, padding, jute, canvas," 40,000 yds., "approximately," to be as per sample submitted #816, 22″ in width at 32 cents per yard, and 50,000 yds., "approximately" as per sample #100, 24″ in width, at the price of 33 cents per yd. Delivery of said material was to be completed on or before September 12, 1918.

The plaintiff duly delivered 100,002½ yds. of said material called for by said contract and received final payment therefor by public voucher #1890, in which it is certified: "Total amount vouched accepted as excess delivery as per auth. Q. M. C. O., dated Sept. 20, 1917, File 420,123 C. E. (Genl.)—William R. Baker, 2nd Lieut. Q. M. C., cont. #1001, dated Aug. 13, 1918, order #2–2539."

XV. On September 4, 1918, the Quartermaster Corps entered into a contract, #10071 (order 2–3640), with plaintiff for delivery to the depot quartermaster, New York City, 132,530 yds. "cloth, jute, canvas padding, 22″ width," as per samples submitted #9270, or #56, or #612, at 32 cents per yard; delivery to be made on or before Oct. 4, 1918.

The plaintiff duly delivered 119,403 yds. of said material called for by the contract and received payment therefor by public voucher #4145 (New York depot, zone supply office) as on contract 2–3640, dated Sept. 4, 1918.

XVI. Each of the aforesaid public vouchers given in final payment and adjustments of said contracts as indicated contained the further certificate, signed by an officer of the New York office of the Quartermaster Corps: "I certify that the above articles have been received by me in good condition, and in the quantity and quality above specified, or the services performed as stated, and they are in accordance with orders therefor; that the prices charged are reasonable, and in accordance with the agreement, or that they were secured in accordance with No. 3 of the method of advertising and under the form of agreement lettered *a* as shown on the reverse hereof." At the time this certificate was issued and payments made the officer did not know of contract No. 1430 or what had been done thereunder.

XVII. The materials delivered under the contracts subsequent to contract No. 1430 were not similar to foreign

make. Jute canvas padding was difficult of obtainment throughout the year 1918 and then at only greatly advanced prices ranging from $0.20 to $0.39 per yard, according to the weight, weave, and quality of the material. Quality #612, stipulated to be supplied under contract #1430, was obtainable at a market price of $0.3510 on May 8, 1918, and was likewise obtainable on May 15, 1918, at a market price of $0.27½ per yard, the average market price being $0.31175.

XVIII. Under contracts subsequent to contract No. 1430 the plaintiff delivered to the defendant 1,261,406.5 yards of jute canvas at prices ranging from 24 cents per yard to 33 cents per yard, with an average price of $0.3022 per yard.

For the 409,026.5 yards undelivered under contract No. 1430, the defendant paid to the plaintiff for 64,000 yards of jute canvas of style #612, which said material was like and equal in all respects to the samples of the same style numbers submitted under contract No. 1430, at unit prices per yard ranging from 27½ to 35.10 cents, the sum of $8,432.00 in excess of the amount required to be paid for the same yardage under contract No. 1430. For the remaining yardage undelivered of sample numbers 508, 20J, and 814, the defendant paid to the plaintiff for jute canvas the average unit price of $0.3022 per yard, or the sum of $33,939.73 in excess of the amount the defendant was required to pay under contract No. 1430.

The court decided that plaintiff was entitled to recover $8,604.90, less the sum of $8,432.00 due defendant on its counterclaim.

BOOTH, *Chief Justice*, delivered the opinion of the court:

On January 9, 1928, the defendant obtained a judgment against the plaintiff for $45,140.56 on a counterclaim. The case as originally decided embraced the following state of facts:

The plaintiff contracted on September 4, 1918, under contract #10069, to furnish and deliver to the defendant 320,000 yards (more or less) of jute canvas. The price was fixed at $0.27 per yard. The plaintiff delivered and the defendant accepted 351,870 yards of jute and was paid for 320,000

yards, leaving a conceded balance due the plaintiff of $8,604.90, i. e., 31,870 yards at the contract price. The plaintiff sues to recover this amount. The defendant filed a counterclaim and contended for a judgment against the plaintiff of either the sum of $53,745.46 or $63,653.54. The defendant's counterclaim arose out of a contract, known as #1430 entered into by the parties on October 19, 1917. By the terms of this contract the plaintiff was to furnish and deliver to the defendant 655,600 yards of specified jute. The jute was to be delivered upon stated dates, final deliveries to be completed by January 31, 1918. The plaintiff concedes a failure to deliver all the jute required, and admits a deficit of 409,026½ yards. Exemption from failure to deliver was claimed under a British embargo during the war forbidding the exportation of jute, and a contention that the supply of the quality required under the contract was obtainable in no other country.

On May 6, 1918, May 7, 1918, July 1, 1918, August 13, 1918, and September 4, 1918, respectively, the plaintiff entered into five separate contracts for the sale of specified qualities and quantities of jute. The plaintiff supplied the contract jute, a total yardage of 1,261,406½, and at a price greatly in excess of that fixed in contract #1430, and was paid therefor. Defendant's counterclaim is predicated upon a breach of contract #1430 and the right under the express terms of paragraph 8 of said contract to resort to the open market and purchase a sufficient quantity of jute to supply the deficiency caused by plaintiff's failure to deliver the stipulated quantity of jute. In our former opinion we were convinced that the defendant's contention should be sustained. We adhere to those views in so far as a breach of the contract and a right to purchase in the open market is involved.

The court was convinced on the first trial, and now adheres to that opinion, that the plaintiff clearly failed to observe the obligations of contract #1430 and is entirely without a legal defense for so doing. No effort was made to procure jute in the United States, where the supply, while not precisely of the same quality, was available; instead, the plaintiff, in the face of an obvious default, with full knowledge of the condition

of affairs, contracted for future deliveries at enhanced prices, and met with no difficulties in observing the later contracts. No offer was made to deliver American jute under contract #1430 and no notice brought to the defendant that a prior contract, i. e., contract #1430, was in existence and at the time remained unperformed. The necessity of granting a new trial and entering a new judgment is predicated entirely upon a review of the record on the single point of proof of damages sustained by the defendant. The record, we think, fails to furnish proof of a market price for each style and quality of jute to be furnished under contract #1430, and, as hereafter discussed, is the one determinative factor in the reversal of our former opinion.

The plaintiff's brief and oral argument emphasize the rule of damages where a contract of sale is breached, and especially insist that the court was in error in applying the rule in this case. Plaintiff by the terms of contract #1430 was to complete deliveries on January 31, 1918. Deliveries were never completed. The rule of damages, firmly fixed, is conceded to be, in a contract for the sale and delivery of an article, the difference between the contract price and the market price on the date of delivery or a reasonable time thereafter. The difficulty the court encountered in applying the rule was ascribable to the fact that the five subsequent contracts between the parties, commencing in May, 1918, and extending through September, 1918, were all executed in ignorance of the breach of contract #1430, without regard thereto, and were in fact totally independent transactions. We held that inasmuch as the plaintiff assented to the price fixed in the five later contracts and furnished the merchandise at that price, plaintiff had by his own conduct established the market price, and we accepted in most respects the proof of the defendant wherein the market price was fixed by an ascertainment of the average price paid to the plaintiff under the five contracts made subsequent to January 31, 1918. There are, we think, valid reasons for sustaining the holding, and the question is not free from doubt. It is to be noted, however, and the plaintiff presses the point, that a significant length of time

Opinion of the Court

elapsed between the date of the breach of contract #1430 and the purchase of jute under the first of the five contracts, viz, May 6, 1918, and it is evident that the jute then purchased was so purchased without reference to a possible allocation of the same to the deficiency under contract #1430. Therefore, there is room for a possible injustice being done the plaintiff by ascertaining the extent of damages done the defendant by resting the amount upon the difference between the contract price fixed in contract #1430 and the average prices fixed in the five later contracts. In the absence of sufficient proof of market price, except as to be hereafter noted, during the interim, i. e., from January 31, 1918, to September 4, 1918, we are now of opinion that the judgment for the defendant upon the counterclaim should be materially reduced. Adhering rigidly to the fundamental rule of damages, and construing the contract in accord with its express provisions, there is no evidence, except as above discussed, as to the market price of *each* quality of jute to be supplied under contract #1430 immediately following the breach. The record does disclose that on May 8, 1918, style #612 of contract #1430 was procurable, and an established market price therefor of $0.3510 existed. It is also established by the plaintiff's own testimony that on May 15, 1918, the same could have been purchased in the open market at 27¼ cents per yard, making as readily ascertainable an average market price of $0.31175 per yard. Giving the plaintiff the benefit of his contention that the jute supplied on his five last contracts was not of the exact quality he was obligated to supply under his contract #1430, we now find from the record a market price for 64,000 yards of jute of the identical quality (#612) he should have and did not supply under contract #1430. The difference between the contract price of 18 cents per yard and the average market price of $0.31175 for 64,000 yards of jute amounts to $8,432.00, and against the plaintiff's right to recover under contract #10069 this amount should be charged.

We are of the opinion that the proof of market price relied upon by the court is from point of time, within the

rule as to reasonableness, and we are firmly convinced that it meets in all its aspects the technical significance of the rule requiring the defendant to supply a contract deficiency by going into the open market and purchasing merchandise of the same kind and quality.

The former judgment will be set aside and the opinion of the court withdrawn and new trial granted. A judgment will, upon the new trial, be awarded in favor of the plaintiff for $172.90. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

BEIRNIE S. BULLARD, ADMINISTRATRIX OF WILLIAM H. G. BULLARD, v. THE UNITED STATES

[No. F-104. Decided October 15, 1928]

On the Proofs

Officer's change of station; transportation to home to await orders.—An officer of the Navy, detached from duty and ordered to his home to await further orders, has been ordered to make a permanent change of station within the meaning of section 12 of the act of May 18, 1920, as amended by the act of June 10, 1922, providing for reimbursement of cost of transportation of wife and dependent child or children.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the brief.

Mr. W. W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On motion of the attorneys for William H. G. Bullard, who died on November 24, 1927, Beirnie S. Bullard, administratrix of the estate of William H. G. Bullard, has been substituted as plaintiff in this case.

II. On June 19, 1922, William H. G. Bullard was a rear admiral in the Navy in command of the Yangtze patrol

force, Asiatic Fleet. Under orders of July 22, 1922, he was detached from duty as commander of the Yangtze patrol force and ordered to proceed to his home and await orders, proceeding via merchant conveyance from Shanghai, China, to Miike, Japan, thence by transport about September 17, 1922, to San Francisco. Subsequently the commander in chief of the Asiatic Fleet requested authority to order him from Shanghai to Seattle by merchant conveyance, which was authorized by the Bureau of Navigation, July 25, 1922.

Admiral Bullard proceeded as directed from China to his home, Charles Town, West Virginia, arriving there September 25, 1922.

His wife, who was with him in China during his tour of duty, traveled with him from Shanghai, China, to their home at Charles Town, West Virginia, at an expense for transportation of $424.78, which was paid by the decedent. No transportation for his wife was furnished by the United States.

III. The cost of transportation of Mrs. Bullard was paid to Admiral Bullard by a Navy disbursing officer in the Bureau of Supplies and Accounts by order of the Secretary of the Navy on advice of the Judge Advocate General during the quarter ending December 31, 1922.

Said disbursing officer having been denied credit in the settlement of his accounts for the $424.78 so paid, the Secretary of the Navy requested the opinion of the Attorney General on the legality of the payment.

The Attorney General by opinion dated December 24, 1924 (34 Opins. Atty. Gen. 346–352), said, after reviewing the Executive order and the standing instructions of the Secretary of the Navy:

"In view of the beneficial purpose of the act, you are advised that, in my opinion, an officer detached from duty and ordered to his home to await further orders has been ordered to make a permanent change of station within the meaning of said act, and that transportation of the officer's wife and dependent child or children must be furnished in kind or in money from the station last occupied by said officer to the place to which he has been directed to proceed."

Thereafter during the quarter ending December 31, 1925, said amount of $424.78 was recovered from decedent by deduction from his pay and was never restored to him.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

Rear Admiral Bullard, being in command of the Yangtze patrol force, Asiatic Fleet, on the coast of China, was, on July 22, 1922, ordered detached from that duty and to proceed to his home at Charles Town, W. Va., and await orders. His wife was accompanying him and was at Shanghai, China, and traveled with him to their home at Charles Town. No transportation was furnished him for his wife by the Government. He paid it himself in the sum of $424.78. Reimbursement of this amount was made him shortly after the performance of the travel by order of the Secretary of the Navy under advice of the Judge Advocate General. Three years later it was checked against him and taken out of his pay; hence this suit.

Sec. 12 of the act of May 18, 1920 (41 Stat. 604), provides:

"That hereafter when any commissioned officer, noncommissioned officer of the grade of color sergeant and above, including any noncommissioned officer of the Marine Corps of corresponding grade, warrant officer, chief petty officer, or petty officer (first class), having a wife or dependent child or children, is ordered to make a permanent change of station, the United States shall furnish transportation in kind from funds appropriated for the transportation of the Army, the Navy, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey, and the Public Health Service to his new station for the wife and dependent child or children."

This act was amended by the act of June 10, 1922 (42 Stat. 631), which authorizes, in lieu of the transportation in kind provided by the act of May 18, 1920, the payment in money of amounts equal to the commercial transportation costs when the travel shall have been completed.

The question here is, Did the order given Admiral Bullard constitute a permanent change of station within the meaning of the statute? The statute defines "permanent station"

as a shore station or the home yard of a vessel. In this case the decedent was detached from duty and ordered "to proceed to his home and await orders." The question having arisen as to whether an order detaching an officer from a permanent station and ordering him to his home to await orders was a permanent change of station within the meaning of the statute, the Secretary of the Navy resolved the doubt by the following order:

"An officer detached from duty and ordered to his home to await orders is ordered to make a permanent change of station and transportation of wife and children is authorized."

It is not necessary to discuss the reasonableness of this order. We do not say it was unreasonable. It is enough that the question whether the change ordered in this case and other cases like it amounted to a permanent change of station within the meaning of the statute was at least doubtful, and where the meaning of a statute is doubtful the construction by the department to which is intrusted the execution of the statute is entitled to great weight, and, unless clearly erroneous, will be upheld. (*United States* v. *Philbrick*, 120 U. S. 52, 59; *National Lead Co.* v. *United States*, 252 U. S. 140, 145.)

It is clear that an officer ordered from a permanent station to another station, or even to his home, "to await orders," is under orders at a station waiting to receive further orders. He is required to remain at a particular place to await orders and his duty is to go to that place and remain there. He can not go elsewhere. His station has been permanently changed. His post is where ordered, and there he must stand ready to obey such further orders as he may receive, and subject to further assignment. The fact that the place to which decedent was ordered to proceed was his home does not alter the situation. (*United States* v. *Williamson*, 23 Wall. 411, 415; 10 C. Cls. 50, 61; *United States* v. *Lippitt*, 100 U. S. 663.)

The question in this case was referred by the Secretary of the Navy to the Attorney General for an opinion (34 Opins. Atty. Gen. 346, 352), and the Attorney General reached the same conclusion that has been reached by this

court. Judgment should be entered for the plaintiff in the sum named in the petition and it is so ordered.

SINNOTT, *Judge*; GREEN, *Judge*; MOSS, *Judge*; and BOOTH, *Chief Justice*, concur.

CORNING DISTILLING CO. v. THE UNITED STATES[1]

[No. F-215. Decided October 15, 1928]

On the Proofs

Tax on alcohol; in bond prior to prohibition act; withdrawal thereafter; allowance for shrinkage.—Where before the effective date of the national prohibition act plaintiff engaged in the business of distilling alcohol for beverage purposes, had its alcohol in bond and gauged, and thereafter withdrew a portion for sale to another company for the purpose of denaturation, a loss ascertained upon regauging in excess of the allowable quantity specified in the Carlisle Act, as amended, was properly taxable under the internal revenue laws, notwithstanding section 14, Title III, of the national prohibition act.

The Reporter's statement of the case:

Mr. Levi Cooke for the plaintiff. *Cooke & Beneman* were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Corning Distilling Company, is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business at Peoria, Illinois.

II. At all times material herein plaintiff owned and maintained a distillery and internal revenue bonded warehouse at Peoria, Illinois, known as distillery No. 22 in the first collection district of Illinois, and operated and maintained such distillery and bonded warehouse under the internal revenue laws and other statutes of the United States pertaining thereto.

[1] Certiorari denied.

Reporter's Statement of the Case

III. Subsequent to the effective date of the national prohibition act, January 16, 1920, plaintiff operated under certain permits issued by the Prohibition Commissioner, or by his authority.

IV. During the months of June, July, August, and September, 1917, plaintiff manufactured alcohol which it stored in barrels in its warehouse as provided by law.

V. Under date of September 13, 1920, the collector of internal revenue for the first district of Illinois issued to plaintiff permit No. 11, on Form 1465, being as follows:

Permit No. 11

Treasury Department
U. S. Internal Revenue
Form 1465

Penal Sum of Bond, $100,000

PERMIT TO SHIP ALCOHOL TO DENATURING PLANT

UNDER TITLE III OF THE NATIONAL PROHIBITION LAW

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
1ST DISTRICT OF ILLINOIS,
September 13, 1920.

Permit is hereby granted to Corning Distilling Company, proprietor of distillery bonded warehouse No. 22, located in the first collection district of Illinois, to ship alcohol to U. S. Industrial Alcohol Company, proprietor of denaturing plant No. 5, located in this collection district, said alcohol to be used for denaturation or to be withdrawn for other tax free purposes as provided by law and regulations issued pursuant thereto.

H. W. MAGER, *Collector.*
J. W. H.
T. T. R.

[Vendor's copy]

Treasury Department
U. S. Internal Revenue
Form 1410 A—Revised Nov., 1921

Serial Number
of Permit to Purchase
A 59479

PERMIT TO PURCHASE

Part 1. Permit No. B 325, A–59479

You are hereby authorized and permitted to purchase or procure from Corning Distilling Company, Peoria, Illinois,

Reporter's Statement of the Case

permit No. Ill. A–28, the kind and quantity of liquors stated below:

Alcohol, 70 barrels (seventy barrels alcohol)

to be delivered to and stored on the premises covered by permit duly issued to you on Form 1405, for disposition or use solely as provided in such permit. This permit to purchase expires 90 days after day.

Application having been duly presented and approved, permit is hereby granted, subject to the following conditions: That you will strictly observe the national prohibition act and all regulations issued thereunder and the laws of the State relating to intoxicating liquor within whose jurisdiction the privilege herein conferred may be exercised; and that the applicant and his agents will be held responsible for such liquor being diverted to any unlawful purpose.

OFFICE OF FEDERAL PROHIBITION DIRECTOR,
Chicago, Illinois, August 12, 1922.

To U. S. INDUSTRIAL ALCOHOL COMPANY,
Clark Street, Peoria, Illinois:

(870 H)

Confirmed by telegraph. Sept. 18, 1922. H. C. Fuller, U. S. gauger.

CHAS. A. GREGORY,
Federal Prohibition Director.
Per E. J. N.,
Associate Director.

Part 2. To be filled in by vendor

The following-described liquors were delivered to U. S. Industrial Alco. Co., to me personally known, or properly identified, on Sept. 20, 1922:

Description of goods as known to the trade	Number and kinds of packages	Serial number of each package	Wine gallons	Proof gallons
Alcohol	70 barrels	1801220–250 1801252–262 1801264–291	2,775.42	4,890.76

CORNING DISTILLING CO.
J. G. CORBETT.

Reporter's Statement of the Case

Part 3. For use of vendee in obtaining consignment from carrier

Affidavit

Subscribed and sworn to before me this ---------- day of ------, 192--.

(Name of officer or agent)

(Title)

I hereby swear or affirm that part 1 hereof is a true copy of the permit to purchase issued to me by the Federal Prohibition Director, and that it has not been changed in any manner since its receipt by me.

(Signed) ----------------
(Vendee)

------------------, who signed the above affidavit, is
(Name of vendee)
personally known to and is hereby identified by me.

(Signature and address of person identifying vendee)

VI. During the months of September and October of the year 1920, under the aforesaid permit Form 465, there were withdrawn from said warehouse of the plaintiff for the purpose of denaturation, fifteen hundred (1,500) barrels of said alcohol which had been stored in said bonded warehouse of the plaintiff in the months of June, July, August, and September of the year 1917. The alcohol in the said 1,500 barrels was gauged upon entry thereof into the bonded warehouse of the plaintiff and was regauged upon withdrawal thereof from the bonded warehouse for the purpose of denaturation. The regauge on said withdrawal disclosed a loss of alcohol from said 1,500 barrels amounting to 2,777.9 proof gallons in excess of the loss allowed under the so-called Carlisle Act of August 27, 1894, as amended by the act of March 3, 1899 (28 Stat. 509; 30 Stat. 1349). No regauge was made of the spirits on October 28, 1919, or at any other time, except upon entry into and withdrawal from the warehouse as aforesaid. The losses of 2,777.9 proof gallons occurred between June, July, August, and September, 1917, and September and October, 1920.

Reporter's Statement of the Case

VII. The said 1,500 barrels of alcohol were at all times in the joint custody of the plaintiff and the collector of internal revenue of the district in which the distillery was located, as provided by law, and the loss of said 2,777.9 proof gallons of alcohol was due to evaporation or other shrinkage, leakage, or unavoidable cause during withdrawal, warehousing, storage, or shipping.

VIII. Neither the plaintiff nor any agent or employee of the plaintiff diverted any of said alcohol to any illegal use, and the Commissioner of Internal Revenue was satisfied that none of it had been diverted to any illegal use.

IX. Plaintiff was not and is not indemnified against said loss by any valid claim of insurance.

X. The collector of internal revenue for the first district of Illinois demanded from the plaintiff tax at the rate of $2.20 per gallon on the said 2,777.9 gallons of alcohol lost in excess of that provided for under the aforesaid Carlisle Act, which tax amounted to $6,111.38, which was paid in full.

XI. On or about November 5, 1920, plaintiff filed with the Commissioner of Internal Revenue, within the time limit provided by law, a claim for refund of said $6,111.38, and on or about October 1, 1923, the plaintiff was advised by the said Commissioner of Internal Revenue that the said claim for refund had been allowed, and with said notice of allowance was enclosed a check of the disbursing officer of the Treasury Department in amount of $6,915.90, representing $6,111.38 tax and $804.52 interest allowed on said claim for refund.

XII. In May, 1924, the Commissioner of Internal Revenue reassessed the tax on the 2,777.9 gallons of spirits at the rate of $2.20 per proof gallon, the total tax assessed being $6,111.38, which amount had previously been assessed and refunded pursuant to claim aforesaid. On June 2, 1924, the plaintiff made and filed with the collector of internal revenue, within the time prescribed by law, a claim for abatement of the amount assessed, which claim was rejected on July 2, 1925, whereupon the tax in the sum of $6,111.38 was duly paid to the collector, together with $305.57 penalty and $855.59 interest.

Reporter's Statement of the Case

XIII. On or about September 17, 1925, plaintiff filed with the Commissioner of Internal Revenue, within the time prescribed by law, a claim for the refund of the said reassessed taxes, penalty, and interest, amounting to $7,272.54. More than six months have elapsed since said claim was filed with the Commissioner of Internal Revenue, and the commissioner has not acted thereon.

XIV. During the month of September of the year 1922 there were withdrawn from the said warehouse of the plaintiff, for the purpose of denaturation under the aforesaid permits issued in the month of August, 1922, five hundred and sixty (560) barrels of said alcohol which had been stored in said bonded warehouse of the plaintiff in the months of July, August, and September of the year 1917, as aforesaid. The 560 barrels of alcohol in question were gauged upon entry thereof into the bonded warehouse, and were regauged upon the withdrawal therefrom for the purpose of denaturation. Upon regauge for withdrawal, a loss was disclosed of 4,716.3 proof gallons of alcohol in excess of that allowed under the so-called Carlisle Act of August 27, 1894, as amended by the act of March 3, 1899 (28 Stat. 509; 30 Stat. 1349). No regauge was made of the spirits on October 28, 1919, or at any other time except upon entry into and withdrawal from the warehouse aforesaid. The losses of 4,716.3 proof gallons occurred between July, August, and September, 1917, and September, 1922.

XV. The 560 barrels of alcohol in question were at all times in the joint custody of the plaintiff and the collector of internal revenue of the district in which the distillery was located, as provided by law, and the loss of said 4,716.3 proof gallons of alcohol was due to evaporation or other shrinkage, leakage, or unavoidable cause, during withdrawal, warehousing, storage, or shipping.

XVI. The collector of internal revenue for the first district of Illinois demanded and collected from the plaintiff tax at the rate of $2.20 per proof gallon on said 4,716.3 gallons, amounting to $10,375.86.

XVII. On or about October 14, 1922, plaintiff filed with the Commissioner of Internal Revenue, within the time

prescribed by law, a claim for refund of said $10,375.86, and on or about July 25, 1924, the Commissioner of Internal Revenue notified the plaintiff that the said claim for refund was rejected.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court.

This is a suit to recover $17,648.40 and interest thereon, the amount of an alleged illegal tax exaction by the Commissioner of Internal Revenue. The plaintiff, an Illinois corporation, operated a distillery and bonded warehouse at Peoria, Illinois. In the months of June, July, August, and September, 1917, it placed in bond a large quantity of alcohol, the same being then gauged as to quantity. In October, 1920, plaintiff received a permit to sell, and the United States Industrial Alcohol Company a permit to purchase, what totaled in the end 1,500 barrels of plaintiff's alcohol for the purpose of denaturation. Upon the withdrawal of the alcohol by the plaintiff it was regauged, with the result that actual evaporation and shrinkage exceeded the arbitrary quantity of allowable loss fixed in the Carlisle Act (28 Stat. 509) amended (30 Stat. 1349), by 2,777.9 gallons. The commissioner levied and collected a tax of $2.20 per gallon on this excess quantity. Plaintiff filed a refund claim, insisting upon the illegality of the tax. The commissioner at first allowed the refund, but subsequently in May, 1924, reassessed and collected the tax with interest and penalties. The amount of the tax paid is not contested, nor is there room for disputation as to the facts. The legality of the tax is not challenged if the Carlisle Act is applicable. A transaction similar in most respects, involving all but one of the contentions herein, took place in September, 1922, when 560 barrels were withdrawn by the plaintiff and sold to the same company, disclosing an excess loss of 4,716.3 gallons over the loss allowable under the Carlisle Act.

Plaintiff rests its case upon section 14, Title III, of the national prohibition act (41 Stat. 321), which provides:

"Whenever any alcohol is lost by evaporation or other shrinkage, leakage, casualty, or unavoidable cause during distillation, redistillation, denaturation, withdrawal, piping, shipment, warehousing, storage, packing, transfer, or recovery of any such alcohol the commissioner may remit or refund any tax incurred under existing law upon such alcohol, provided he is satisfied that the alcohol has not been diverted to any illegal use: *Provided, also*, That such allowance shall not be granted if the person claiming same is indemnified against such loss by a valid claim of insurance."

The Carlisle Act, passed August 27, 1894, provides in terms for the gauging and regauging of distilled spirits placed by distillers in bonded warehouses. It sets up the method of gauging, the time in which losses may be claimed, and fixes the quantity to be allowed as a loss under the conditions of the statute. Plaintiff received a tax exemption under this statute from the commissioner. What is now claimed is an exemption from tax of the actual loss from evaporation, leakage, etc., ascertained by the regauge upon withdrawal under the terms of the foregoing prohibition act.

We do not think we need indulge in extended argument in reaching a conclusion adverse to the plaintiff's contention. The plantiff was a preprohibition distiller, lawfully engaged in distilling ardent spirits for beverage purposes. It had in storage in its bonded warehouse, when the eighteenth amendment came into force, the quantity of alcohol involved in this suit. Subsequent to the adoption of the amendment and the passage of the prohibition act this quantity of grain alcohol could only be sold in the manner prescribed by the statute. This the plaintiff was permitted to do. The plaintiff was not and never has been engaged in producing industrial alcohol. It has never sought a permit or license so to do. The section of the prohibition act upon which reliance is had is not directed toward the disposition of grain alcohol distilled prior to its effective date for purposes other than industrial. Section 14 when considered in *pari materia* with

the statute as a whole seems to be clearly but a part of the general scheme of regulating the production and sale of industrial alcohol, and has no relation to the disposition of the vast quantities of alcohol distilled under then existing law several years prior to prohibition. This we think is obvious from the provisions of section 6 pointing out a way in which grain alcohol, in being prior to the statute, may under regulations be converted into industrial alcohol and sold. The plaintiff did not follow this course. It sold existing alcohol to another to be so converted, and we are at a loss how claim may be made under the prohibition act when plaintiff did no more than supply an industrial-alcohol plant with alcohol to be so converted. Plaintiff at no time operated under the national prohibition act in this respect. Section 6 in conjunction with section 9 emphasizes the force of this construction and leaves, we think, little if any doubt that the commissioner's construction of the laws was correct. As the defendant's brief discloses, the loss by way of evaporation, shrinkage, etc., occurred in its major portion prior to the passage of the prohibition law and had it not been for prohibitory legislation would have been ascertainable under the Carlisle Act. When prohibition came legislation was essential, both with respect to alcohol on hand and as to its future production and sale for industrial purposes. Congress provided for both contingencies; existing supplies might under permit and regulations be sold or converted for especial purposes, and the future demand as supplied under the sections of the prohibition law (as disclosed in its various sections). In so legislating, we may not ascribe to Congress an intent to exempt from taxation alcohol produced prior to the passage of the act, the taxing of which was fixed in amount and quantity at the time of its distillation. The plaintiff did not produce or sell industrial alcohol, nor was its loss occasioned during distillation, redistillation, denaturation, etc., as the section provides. The plaintiff did not denature its product at all. The plaintiff seems to us to be in exactly the same situation as a distiller of distilled spirits; he may under regulations and permits sell his distilled spirits, but in so doing he may not escape the revenue laws applicable to a distiller of distilled spirits when they were

distilled. The alcohol mentioned in section 14 made tax free is the industrial alcohol to be used for industrial purposes, and can not claim the exemption until it becomes industrial alcohol under the statute.

The petition will be dismissed. It is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

GREEN, *Judge*, dissents.

STAUFFER, ESHLEMAN & CO., LTD., v. THE UNITED STATES

[No. H-24. Decided October 15, 1928]

On the Proofs

Interest on refund of taxes; request for special assessment as claim for refund.—Where a letter to the Commissioner of Internal Revenue is merely a request for a special assessment under the relief provisions of the revenue acts of 1917 and 1918, it is not a claim for refund within the meaning of section 3226, Revised Statutes, as amended, and on a refund due to such reassessment no interest is allowable.

The Reporter's statement of the case:

Mr. Ben Jenkins for the plaintiff. *Mr. Earle W. Wallick* and *Wallick & Shorb* were on the brief.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, a Louisiana corporation, within the period prescribed by law and on the official forms provided, made and filed its income and profits tax return for the fiscal year ended June 30, 1918, indicating a tax liability of $228,933.14, which was assessed and of which $226,144.85 was paid.

II. On the 4th day of October, 1920, the plaintiff mailed a letter to the Commissioner of Internal Revenue in which plaintiff requested the Commissioner of Internal Revenue to take its return for the fiscal year ended June 30, 1918,

under consideration for assessment under the relief sections of the act of October 3, 1917, and the 1918 revenue act. Said letter reads as follows:

NEW ORLEANS, LA., *October 4, 1920.*

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

DEAR SIR: In response to your letter of September 30th, IT: T: CR: AF: HKB-62750978, you will find inclosed amended separate returns for the periods ended June 30, 1918, and June 30, 1919, of the Stauffer Land Co. and ourselves. These are the only two periods for which consolidated returns were filed.

In this connection we beg to call your attention to the great amount of taxes we are now compelled to pay, which we believe is far greater than any like corporation has paid. You will note from our return that the officers are very poorly paid, and you will also observe that the Stauffer Land Co. does not pay any salary to its officers. Besides we rent the best property owned by the land company, for which we pay only about 50% of its actual rental value, all of which goes to swell our income but makes our taxes extremely heavy.

As stated in our questionnaire, no attempt has been made to pay the Stauffer Land Co. the real rental value of the property, because substantially all of the stocks of both corporations being owned by the same family.

In view of the foregoing and since we are not permitted to file consolidated returns we respectfully request that you take our returns of June 30, 1918, June 30, 1919, and June 30, 1920, under consideration for assessment under the relief sections of the act of October 3, 1917, and the 1918 revenue act.

While we have named A. Baldwin & Co. and Woodward Wight & Co., of this city, as two corporations engaged in a similar business, we could only be compared with A. Baldwin & Co. for the reason that the Woodward Wight & Co. are also wholesale grocers and ship chandlers.

We know of no other large strictly wholesale hardware house in this city that could be compared with ourselves.

Thanking you in advance for your kind consideration of our case, we beg to remain,

Very truly yours,

(Sgd.) STAUFFER-ESHLEMAN CO., LTD.

III. On the 16th day of November, 1923, the Commissioner of Internal Revenue mailed a letter to the plaintiff,

in which it was advised that its application for assessment under the provisions of section 210 of the revenue act of 1917 and section 328 of the revenue of 1918 had been allowed, resulting in an overassessment for said fiscal year in the sum of $38,379.57.

On the 28th day of February, 1924, the Commissioner of Internal Revenue approved a schedule of overassessment known and designated as Schedule IT: A: 8747, embracing among other overassessments the overassessment in favor of plaintiff of $38,379.57, and transmitted the same to the collector of internal revenue for his consideration in accordance with the instructions appearing thereon.

Upon the receipt of said schedule of overassessment the collector of internal revenue examined the account of plaintiff and applied $2,788.29 of said overassessment as an abatement of the balance of the tax due for said fiscal year, $28.91 as a credit against an additional tax liability for the fiscal year ended June 30, 1919, and returned the schedule to the Commissioner of Internal Revenue with a report of his action thereon.

IV. On the 13th day of May, 1924, the Commissioner of Internal Revenue approved a schedule of refunds and credits known and designated as Schedule IT: R: 8747, and transmitted the same to the disbursing clerk of the Treasury, authorizing said disbursing clerk to issue to plaintiff check for the balance of $35,591.28. Check for said amount was thereafter issued, was received, and cashed by the plaintiff.

V. The Commissioner of Internal Revenue in crediting and refunding to the plaintiff the said overpayment for the fiscal year ended June 30, 1918, allowed to the plaintiff no interest on the credit of $28.91, nor upon the refund of $35,562.37.

VI. On the 22d day of November, 1924, the plaintiff mailed to the Commissioner of Internal Revenue a letter in which plaintiff requested to be advised whether or not plaintiff was entitled to interest on its claim.

VII. On the 19th day of January, 1925, the Commissioner of Internal Revenue mailed a letter to the plaintiff in which plaintiff was advised that interest was not allowable for the

reason that the credit and refund were not made upon the allowance of a claim for credit or refund.

The court decided that plaintiff was not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

The sole question for determination in this case is whether or not the letter from plaintiff to the Commissioner of Internal Revenue dated October 4, 1920, may properly be treated as a claim for refund within the meaning of section 1324 (a) of the revenue act of 1921 (42 Stat. 227) and section 1113 of the act of 1926 (44 Stat. 116). The pertinent language of section 1324 (a) is as follows: "That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit * * *."

Section 1113 (a) of the act of 1926 is an amendment to section 3226 of the Revised Statutes and reads in part as follows: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * *."

It is clear, therefore, that unless the letter in question can be construed as a *claim for refund*, this court is without jurisdiction in the case.

The purpose of the letter of October, 1920, was to file amended separate returns. It is evident from its context that plaintiff had been denied the right to file consolidated returns. The attention of the commissioner was called to the "great amount of taxes we are now compelled to pay, which we believe is far greater than any like corporation has paid." It is then stated, "In view of the foregoing, and since we are not permitted to file consolidated returns, we respectfully request that you take our returns of June 30,

1918, June 30, 1919, and June 30, 1920, under consideration for assessment under the relief sections of the act of October 3, 1917, and the 1918 revenue act." This is the only request contained in the letter, the remainder of which may properly be considered as an argument for the granting of the request. It is in no sense a claim for a refund of taxes. It is nothing more nor less than an application for special assessment under the relief provisions of the revenue acts of 1917 and 1918. (Finding II.) The commissioner complied with plaintiff's request, and as a result of the special assessment a certain sum was refunded. No interest whatever was collectible under the act of 1921 upon the *allowance of a refund.* The right of taxpayers to receive interest on amounts refunded as illegal or erroneous collections was first recognized and provided for by section 1324 (a) of the act of 1921 above quoted, and under the terms of that act interest was allowed only upon the *allowance of a claim for refund.* The letter of October, 1920, was not a claim for refund, and can not be so construed. The petition is hereby dismissed.

SINNOTT, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

GREEN, *Judge*, concurring:

In determining whether the letter of the plaintiff to the Commissioner of Internal Revenue, dated October 4, 1920, may be treated as a claim for refund, it is necessary to consider the Treasury regulations in force at the time. These regulations required that a claim for refund should be made upon a certain form; that all the facts relied upon in support of the claim should be clearly set forth therein under oath; and that it should be accompanied by the collector's receipt or the canceled check showing payment of the tax. Treasury regulations of this nature have uniformly been upheld by the courts. The decisions on this point are so numerous as to make citations unnecessary. The provisions of a Treasury regulation may, of course, be waived; and

it may be said that it has not been the practice of the Treasury to insist on the requirement that the claim should be made upon a particular form, but the letter of the plaintiff complied with absolutely none of the requirements. It merely asked that the plaintiff's taxes be assessed on a different basis. In the recent case of *Tucker* v. *Alexander*, 275 U. S. 228, in a suit brought to recover tax refund, the Supreme Court said:

"Literal compliance with statutory requirements that a claim or appeal be filed with the commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States." (Citing several Supreme Court cases.)

Some claim is made, however, that the action of the commissioner in redetermining the tax in accordance with a request contained in the plaintiff's letter of October 4, 1920, operated as a waiver of the provisions of the law. In the case last cited it was stipulated that if the court found that a certain deduction had been erroneously made, judgment should be for the plaintiff, and the court held that this stipulation and agreement waived the requirements of the regulations. But there is absolutely no evidence in the case at bar to show that anything in the nature of a waiver was done or made on the part of the Government. The commissioner proceeded to reassess the tax as he might have done either with or without the letter. To hold that this action operated as a waiver of the filing of a claim for refund would be to engraft without authority an exception to the law. This, I think, we can not do.

The original intent of Congress that interest should be paid only upon the *allowance of a claim* for refund is shown by the fact that Congress subsequently, by the act of 1924, amended the law so that interest was collectible simply upon the *allowance* of a refund. This amendment, however, is of no aid to the plaintiff, since it was held in *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, that it had no retroactive effect.

WELLS MANUFACTURING CO. v. THE UNITED STATES

[No. H-44. Decided October 22, 1928]

On the Proofs

Excise taxes; timers and coils; automobile parts.—See *Atwater Kent Mfg. Co.* v. *United States*, 62 C. Cls. 419.

Same; appropriation act of February 28, 1927; refund; filing of bond.—The provision in the appropriation act of February 28, 1927, requiring bond for repayment to the United States of undistributed refunds of excise taxes paid upon automobiles and automobile parts and accessories, relates solely to the appropriation made, which lapsed June 30, 1928.

The Reporter's statement of the case:

Mr. R. Colton Lewis for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation duly incorporated under the laws of the State of Wisconsin, with its principal office at Fond du Lac, Wisconsin.

II. Plaintiff paid to the United States in monthly payments, beginning May 18, 1920, and ending March 29, 1926, the manufacturer's excise taxes in the sum of $19,116.45. The period covered by the taxes assessed and collected was from May, 1919, to February, 1926, and the first payment, amounting to $2,686.58, was made May 18, 1920, the remaining payments being made monthly thereafter. On May 31, 1920, the sum of $232.27 was paid as a penalty, on the first payment above mentioned. All of said taxes were assessed and paid under the provisions of section 900, paragraph 3, of the revenue acts of 1918 and 1921, on the sale of timers and coils, manufactured by plaintiff.

III. A timer or distributor, such as those upon which the tax was paid in this case, is a mechanical device, used as a part of the ignition system of internal-combustion

engines. Its purpose is to time and distribute the spark for ignition of the gas, in order to cause an explosion in each cylinder at the proper time. The spark is caused by the making and breaking of an electric current.

An induction coil, such as is involved in this case, is composed of two coils of wire. It is used in connection with a timer in the ignition system of internal-combustion engines, for the purpose of transforming or "stepping up" the current from a low-voltage battery, in order that the current may be made to jump across the spark gap. One coil of wire is termed the primary winding, and the other the secondary winding. The low voltage from the battery is put through the primary winding of the coil, and by the principle of electromagnetic induction and because of a large ratio of turns between said primary and said secondary windings, is accelerated to a high voltage in the secondary winding.

IV. Timers and coils are used on and are essential to the functioning of all internal-combustion engines. They are used on automobiles, farm tractors, lighting plants, airplanes, motor boats, pumping systems, road graders, steam shovels and ditchers, and a large variety of movable and stationary engines. The induction coil was in common use on many kinds of stationary engines, and was considered, manufactured, and sold as an ordinary commercial commodity for many years prior to the advent of automobiles. The plaintiff in this case, or its predecessor company, had a well-established business in the manufacture and sale of coils, identical in mechanical and electrical principles to those here involved, prior to the advent of automobiles.

V. Plaintiff manufactured and sold only one model of timer, on which the tax involved in this case was paid. It was designed and manufactured for, and may be used on, any four-cylinder internal-combustion engine, when properly attached. There is nothing about the appearance, size, construction, or operation of the timer to indicate that it might not be attached to and used on engines of automobiles, trucks, tractors, airplanes, motor boats, road graders, or concrete mixers. It is only necessary that the timing shaft

be properly geared thereto in order to have it function properly upon any of the various engines named.

VI. There was no difference in the electrical or mechanical principles involved or in the functional operation of the coils manufactured by the plaintiff company; and the kind of engine for which it was to be used made no difference in its size, construction, or appearance, and an expert could not tell for what sort of an engine a particular coil was to be used. Any of the timers or coils manufactured by the plaintiff company could by adjustment of attachment plate or shaft, be used on engines other than automobile engines, and an ordinary mechanic could, without difficulty, attach any of them to engines other than automobile engines and they would properly function when so attached.

VII. None of the timers or coils manufactured by the plaintiff were sold to automobile manufacturers, but all were sold to jobbers and wholesalers of ignition equipment, and plaintiff has no means of knowing how many were resold to manufacturers of automobiles. Plaintiff never designed or constructed any particular coil or timer for use on automobile engines, but all were designed and manufactured for ignition purposes generally, and all were sold to the ignition trade generally, rather than to manufacturers of automobiles.

VIII. Each timer and coil manufactured by plaintiff is designated by a distinct model number, and it has many different model numbers of timers and coils, but the principal difference in the various model numbers lies in the case or attachment plates or shafts. All of the timers and coils manufactured by the plaintiff are identical in mechanical and electrical principle, and any of them may be attached to and used on various kinds of internal-combustion engines, as well as automobile engines.

IX. The total amount of taxes paid, $19,116.45, represents amounts paid on the sale of timers and coils to the ignition trade generally. The evidence does not show how many of these articles were resold for use on automobiles or what proportion was sold for use on other kinds of engines.

Reporter's Statement of the Case

A detailed statement regarding said payments by plaintiff, from May, 1919, to February, 1926, is as follows:

	Amount of tax paid	Date paid		Amount of tax paid	Date paid
	$2,686.58	5/18/20	Aug., 1923	$341.21	9/28/23
Apr., 1920	274.38	5/29/20	Sept., 1923	358.61	10/29/23
May, 1920	327.19	6/28/20	Oct., 1923	301.93	11/28/23
June, 1920	429.49	7/27/20	Nov., 1923	209.89	12/29/23
July, 1920	586.21	8/30/20	Dec., 1923	134.59	1/30/24
Aug., 1920	149.31	9/29/20	Jan., 1924	271.03	2/27/24
Sept., 1920	275.19	10/29/20	Feb., 1924	256.66	3/27/24
Oct., 1920	127.46	11/29/20	Mar., 1924	412.53	4/29/24
Nov., 1920	112.94	12/27/20	Apr., 1924	639.68	6/15/24
Dec., 1920	34.16	1/25/21	May, 1924	648.55	6/27/24
Jan., 1921	246.98	2/25/21	June, 1924	577.15	7/26/24
Feb., 1921	92.52	3/29/21	July, 1924	326.58	8/28/24
Mar., 1921	74.44	4/29/21	Aug., 1924	230.85	9/29/24
Apr., 1921	206.38	5/27/21	Sept., 1924	229.85	10/27/24
May, 1921	140.53	6/24/21	Oct., 1924	149.62	11/26/24
June, 1921	104.68	7/26/21	Nov., 1924	137.90	12/26/24
July, 1921	73.67	8/25/21	Dec., 1924	224.36	1/27/25
Aug., 1921	152.51	9/26/21	Jan., 1925	172.22	2/25/25
Sept., 1921	----------		Feb., 1925	106.06	3/28/25
Oct., 1921	60.97	11/28/21	Mar., 1925	171.47	4/27/25
Nov., 1921	212.71	12/27/21	Apr., 1925	167.90	5/27/25
Dec., 1921	339.77	1/28/22	May, 1925	235.23	6/27/25
Jan., 1922	20.54	2/23/22	June, 1925	269.73	7/29/25
Feb., 1922	----------		July, 1925	261.24	8/28/25
Mar., 1922	----------		Aug., 1925	106.19	9/21/25
Apr., 1922	118.80	5/27/22	Sept., 1925	181.15	10/28/25
May, 1922	303.49	6/26/22	Oct., 1925	145.97	11/27/25
June, 1922	218.56	7/27/22	Nov., 1925	102.22	12/29/25
July, 1922	323.01	8/2[illegible]/22	Dec., 1925	128.65	1/26/26
Aug., 1922	395.97	9/26/22	Jan., 1926	90.39	2/26/26
Sept., 1922	226.38	10/27/22	Feb., 1926	89.29	3/29/26
Oct., 1922	436.14	11/27/22			
Nov., 1922	244.74	12/26/22	Total	18,884.18	
Dec., 1922	125.59	1/29/23			
Jan., 1923	189.79	2/26/23	Fine paid on excise tax from May, 1919, to March 31, 1920:		
Feb., 1923	162.11	3/28/23			
Mar., 1923	218.28	4/28/23			
Apr., 1923	221.45	5/28/23	Amount	232.27	
May, 1923	444.30	6/27/23			
June, 1923	380.86	7/28/23		19,116.45	
July, 1923	467.40	8/29/23			

X. All of the taxes paid on timers and coils as stated, $19,116.45, were absorbed by plaintiff, and were not passed on to customers as a charge, in addition to price.

XI. On January 10, 1924, plaintiff filed a claim with the Commissioner of Internal Revenue for refund of a part of the taxes involved in this suit amounting to $13,092.63. This claim was wholly disallowed and rejected on Septemberber 29, 1925.

On August 3, 1926, plaintiff filed a supplemental claim for the remaining portion of the taxes involved in this suit amounting to $6,221.04, and this claim was wholly disallowed and rejected on March 10, 1927.

Opinion of the Court

The items embraced in both of said claims appear in Finding IX herein.

XII. No part of the total sum of $19,116.45 paid to the United States for these taxes has been repaid to plaintiff.

The court decided that plaintiff was entitled to recover $19,116.45 with interest.

SINNOTT, *Judge*, delivered the opinion of the court:

The plaintiff in this case is suing for the refund of excise taxes collected from the plaintiff by the United States, under the revenue acts of 1918, 1921, and 1924, with respect to spark coils and timers manufactured and sold by plaintiff.

The case was referred to a commissioner of this court for a finding and report to the court of the facts. The said commissioner filed his report on March 6, 1928. Neither the plaintiff nor the defendant has filed exceptions to the commissioner's report.

It is admitted in defendant's brief that the essential facts and issues of law, with respect to this case, are similar to those presented by the case of *Atwater Kent Manufacturing Co.* v. *United States*, 62 C. Cls. 419, wherein judgment was rendered for the plaintiff, but it is contended by defendant that plaintiff has not brought its claim within the jurisdiction of this court because plaintiff has failed to file the bond provided for in the following provision in the appropriation act of February 28, 1927, 44 Stat. 1254:

"For refunding taxes illegally collected under the provisions of sections 3220 and 3689, Revised Statutes, as amended by the revenue acts of 1918, 1921, 1924, and 1926, including the payment of claims for the fiscal year 1928 and prior years, $175,000,000, to remain available until June 30, 1928. * * *

"*Provided further*, That no part of this appropriation shall be available to refund any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the revenue act of 1924 or subdivision (3) of section 900 of the revenue act of 1921 or of the revenue act of 1918, unless the Commissioner of Internal Revenue certifies to the proper disbursing officer that such manufacturer, producer, or im-

Syllabus

porter has filed with the commissioner, under regulations prescribed by the commissioner with the approval of the Secretary of the Treasury, a bond in such sum and with such sureties as the commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after the passage of this act, was filed before the allowance of the claim by the commissioner."

It is plain that the above provision relates solely to the appropriation provided for in said act, which was made available until June 30, 1928, after which time the appropriation lapsed. Judgment should be awarded in favor of plaintiff. It is so ordered.

GREEN, *Judge;* Moss, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

BELL & COMPANY AND HOLLINGS-SMITH COMPANY v. THE UNITED STATES

[No. H-116. Decided October 22, 1928]

On the Proofs

Income and profits taxes; special assessment; net loss in succeeding year.—Where in a given year affiliated companies were entitled to the special assessment of sections 327 and 328 of the revenue act of 1918, and deduction from their net income under section 204 of a net loss sustained in the succeeding year, their correct profits-tax liability is to be ascertained by first adjusting the net income under section 204, and then applying thereto the average rate of profits tax paid by comparable concerns, and their income-tax liability, by deducting the profits tax so ascertained, together with the statutory exemption, from the adjusted net income.

The Reporter's statement of the case:

Messrs. F. W. McReynolds and *Walter H. Gilpatric* for the plaintiffs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Bell & Company and Hollings-Smith Company, plaintiffs, are corporations duly organized and existing under the laws of the State of New Jersey and having their principal place of business at Orangeburg, in the State of New York, and are engaged in the manufacture and sale of proprietary medicines and medical compounds.

II. Plaintiffs were "affiliated" under the provisions of section 240 of the revenue law of 1918, and as required by said law filed a joint consolidated income and profits tax return for the years 1918 and 1919.

III. The said plaintiffs, as found by the Commissioner of Internal Revenue and the United States Board of Tax Appeals, had a net consolidated taxable income for the year 1918 of $74,766.78; an "invested capital" of $106,153.90; an "excess-profits credit" of $11,492.31; and a "war-profits credit" of $13,615.39. Based upon these figures, the plaintiffs' profits taxes under section 302 of the law, calculated without benefit of sections 204 or 327 and 328, would have been $48,913.42.

IV. The net income and invested capital of plaintiffs for the year 1918 were abnormal within the meaning of section 327 of the revenue act of 1918, and the commissioner so found; the plaintiffs were therefore entitled to have the profits-tax liability computed under the provisions of section 328 of said act; and the commissioner so found.

V. Plaintiffs suffered for 1919 a "net loss" (as defined in section 204 of the law) of $35,933.62; and the commissioner so found.

VI. Before determining plaintiffs' profits taxes for 1918 under said section 328 of the law, the commissioner first de-

Reporter's Statement of the Case

ducted the 1919 " net loss " of $35,933.62 from the 1918 " net income " of $74,766.78 and then arrived at the plaintiffs' profits and income taxes for 1918 as follows, using the difference, to wit, $38,833.16, as the basis:

NET INCOME

Consolidated net income, bureau letter dated August 15, 1924:	
Bell & Co	$24, 049. 99
Hollings-Smith Co	14, 783. 17
Total	38, 833. 16

TAX COMPUTATION

Profits tax, section 328			15, 902. 76
Net income		$38, 833. 16	
Less:			
Profits tax	$15, 902. 76		
Exemption	2, 000. 00		
		17, 902. 76	
Amount taxable at 12 per cent		20, 930. 40	2, 511. 65
Correct tax liability			18, 414. 41

VII. If the commissioner had applied the same ratio of profits tax to net income as determined under section 328 to the net income of $74,766.78 for 1918 without deducting the net loss of $35,933.62 for 1919 therefrom, the plaintiffs would have been subject to a profits tax of $30,617.00 and a total tax liability of $35,674.97.

VIII. Plaintiffs' profits tax for 1918 (computed under section 302 of the law but without reference to section 328) upon the net income of $74,766.78 less the 1919 net loss of $35,933.62, leaving a net income subject to tax of $38,833.16, would have been $20,166.53 and their total tax liability $22,166.53.

IX. Plaintiffs duly filed their joint appeal to the United States Board of Tax Appeals on July 25, 1925, as provided by the revenue act of 1924, which board in a decision dated April 16, 1926 (said case having been heard by said board February 15, 1926), affirmed the ruling of the said commissioner, said case being "Docket No. 5789," 3 B. T. A. 1241.

X. The plaintiffs duly paid said profits tax of $15,902.76, together with all income taxes due for the said year, in two installments, one on August 30, 1926, and the other on December 7, 1926; and thereafter, to wit, on the 15th day of January, 1927, they filed a claim for refund with the collector of internal revenue for the fourteenth district of New York, in the amount of $14,032.65, which the said commissioner rejected on March 3, 1927.

The court decided that plaintiffs were not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

Plaintiffs, Bell & Company and Hollings-Smith Company, were affiliated corporations, and as such they were required to and did file joint consolidated income and profits tax returns for the years 1918 and 1919. They had a joint net income for the year 1918 of $74,766.78. The commissioner found that plaintiffs were entitled to a special assessment under section 328 of the revenue act of 1918, 40 Stat. 1093, which provides in substance that in cases of abnormality with reference to invested capital, or where the commissioner is unable to ascertain the invested capital, the taxpayer should be required to pay only that sum as profits tax as would be the same percentage of its net income as the average profits tax paid by fairly comparable concerns.

For the year 1919 plaintiff's return showed a net loss of $35,933.62. Section 204 of the act of 1918, 40 Stat. 1060, in so far as applicable, is as follows:

"If for any taxable year beginning after October 31, 1918, and ending prior to January 1, 1920, it appears upon the production of evidence satisfactory to the commissioner that any taxpayer has sustained a net loss, the amount of such net loss shall, under regulations prescribed by the commissioner with the approval of the Secretary, be deducted from the net income of the taxpayer for the preceding taxable year; and the taxes imposed by this title and by Title III for such preceding taxable year shall be redetermined accordingly. Any amount found to be due to the

taxpayer upon the basis of such redetermination shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. If such net loss is in excess of the net income for such preceding taxable year, the amount of such excess shall, under regulations prescribed by the commissioner with the approval of the Secretary, be allowed as a deduction in computing the net income for the succeeding taxable year."

In pursuance of the plain directions of this statute the commissioner deducted from plaintiffs' net income for 1918 the net loss for 1919, and "redetermined" the tax, applying the proper tax rate as determined by the commissioner under the special assessment provision to the newly ascertained net income. (See Finding VI.)

Plaintiffs contend that Congress intended to provide by sections 204 and 328 two separate and distinct methods of relief, and that the taxpayer can receive the benefit of both remedies only by a separate computation. Their contention can best be illustrated by setting forth in this connection the calculation incorporated in plaintiffs' petition. It is as follows:

Net income for 1918	$74, 766. 78
Profits tax under section 302	48, 913. 42
Comparative companies paid 40.95% of their net income in profits tax. 40.95% of $74,766.78 would be	30, 617. 00
A reduction in profits tax under section 328 alone of	18, 296. 42
Plaintiffs suffered a net loss in 1919 of $35,933.62. Deducting this from 1918 net income leaves	38, 833. 16
Profits tax redetermined on this sum under section 301	20, 166. 53
A reduction in profits tax under section 204 alone of	28, 746. 89
Adding reductions due to both sections together makes	47, 043. 21
Deduct total reduction from profits tax under section 302	1, 870. 11

INCOME TAX

Deducting the correct profits tax of $1,870.11 from that exacted by the commissioner of $15,902.76 leaves additional sum subject to 12% corporation tax of	14, 032. 65
Income tax at 12% thereon is	1, 683. 92
Deducting additional income tax due from overpayment of profits tax leaves net overpayment of total tax by plaintiffs	12, 348. 73

Plaintiffs' theory is manifestly incorrect. Sections 327 and 328 operated only to *reduce the rate* of profits tax to the average rate paid by fairly comparable concerns. This

rate, once determined by the commissioner, is to be applied to plaintiffs' net income, whatever that net income is finally determined to be. "Net income" is, in effect, the gross income less certain authorized deductions. A proven net loss for the year 1918 is an authorized deduction from the net income for 1918. We are of the opinion that the commissioner correctly computed plaintiffs' tax liability. The petition will be dismissed and it is so ordered and adjudged.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

BARRETT COMPANY v. THE UNITED STATES

[No. A-107. Decided October 22, 1928]

On Mandate of Supreme Court

Contract; termination; just compensation.—See 60 C. Cls. 343; 273 U. S. 227.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. Francis H. McAdoo* and *King & King* were on the brief.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

In obedience to mandate of the Supreme Court (273 U. S. 227), the court below filed the following addition to Finding III (60 C. Cls. 343, 346):

"The increased expenditure named in this finding was necessary to enable the plaintiff to perform its contract.

"There was a general increase in the price of materials as well as in the wages of labor between the time the contract was entered into and that of the performance of the work.

"Structural steel was extremely difficult to obtain even for war purposes. Even priority orders if granted did not always have the desired effect in view of conflicting priority orders, and the chance that even were priority orders obtained other war work might secure priority over this contract.

"The expedition with which the work was required to be done compelled the putting in of the tanks while the building construction was still going on, the forms for the concrete being put up and the concrete being poured therein.

"It was necessary in meeting the demands, both of the contract and of the officers of the Navy Department for expediting work, for the equipment to be installed prior to stripping of the concrete forms from the concrete. The lumber for the forms for the concrete could not be used a second time because they could not wait for the concrete to dry sufficiently to take out the old forms. By installing the equipment without waiting for the completion of the building, but simultaneously with the construction, several different kinds of mechanics were working on the building at one time, getting in each other's way, thus making the cost greater than if, in accordance with usual practice, the construction of the building had been completed before proceeding with the installation of the tanks and other equipment."

MEMORANDUM BY THE COURT

The opinion of the Supreme Court remanding this case contains the following:

"What the company is entitled to is just compensation for the contract which was taken from it, and under the cases cited it should certainly be credited with the outlay which it can show there was reasonable ground for making in order to fulfill its engagements. On the other hand, the Government may show, without regard to the estimates, that the actual additional expenditures were really not required for the fulfillment of the contract, or if less than what was spent was needed, then how much less. The case must be remanded for new evidence and new findings on this issue."

The plaintiff's new record in response to the mandate indisputably discloses reasonable grounds for making the expenditures claimed. The court in its decision had no doubt of this fact. The decision adverse to plaintiff's contention was rested upon another basis. The defendant produced no testimony—doubtless no witnesses were obtainable—in contradiction of the positive evidence of the plaintiff, disclosing the reasonableness of and necessity for the expenditure of the amount claimed. The necessity for the expendi-

tures made was and is clearly established by the authorization therefor, and the reasonableness of the amount appears from the conditions under which the money was expended, the wages paid, and the price of materials used. We have no doubt from the record that the plaintiff was in nowise extravagant and completed the additions to its plant as economically as it could have been done under existing conditions.

Judgment will be awarded the plaintiff for $95,454.15, with interest at the rate of 6% per annum from the date of cancellation of plaintiff's contract, November 16, 1918, until paid. It is so ordered.

MILWAUKEE MOTOR PRODUCTS, INC., v. THE UNITED STATES

[No. H-40. Decided October 22, 1928]

On the Proofs

Excise taxes; timers and coils; automobile parts.—See *Atwater Kent Mfg. Co.* v. *United States*, 62 C. Cls. 419.

The Reporter's statement of the case:

Mr. R. N. Beebe for the plaintiff. *Mr. David A. Sondel* and *Davies, Jones & Beebe* were on the briefs.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff, Milwaukee Motor Products, Inc., is now, and has been since 1905, a corporation duly organized under the laws of the State of Wisconsin, with its office and principal place of business at Milwaukee, Wisconsin. From the date of its incorporation until October, 1921, the name of said corporation was the Milwaukee Auto Engine & Supply Company, at which time the corporate name was changed by an amendment to its articles of incorporation to Milwaukee Motor Products, Inc.

Reporter's Statement of the Case

II. By monthly payments beginning February 24, 1921, and ending with a payment on July 31, 1924, the plaintiff paid to the United States manufacturers' excise taxes in the sum of $111,395.78, under section 900 (3) of the revenue acts of 1918 and 1921, on the sale of timers manufactured by the plaintiff.

By monthly payments beginning August 27, 1924, and ending with a payment on December 30, 1924, plaintiff paid to the United States manufacturers' excise taxes in the sum of $6,649.41, under section 600 (3) of the revenue act of 1924, on the sale of timers manufactured by plaintiff.

The aggregate sum of excise taxes so paid by plaintiff between February 24, 1921, and December 30, 1924, was $118,045.19.

III. Plaintiff has continuously manufactured timers since 1905. All timers manufactured by plaintiff since that time have been the same in principle, mechanical operation, and general design. The various types manufactured by plaintiff differed slightly from time to time in the method of attachment to engines and in the materials of which they were constructed.

IV. A timer, such as is involved in this matter, is used in ignition system of an internal-combustion engine. A timer or spark timer is a device which coordinates the fire or electric spark in the cylinder of an internal-combustion engine with the correct piston position in the cylinder or respective cylinders; that is, the function of a timer is to send to a proper cylinder a series of sparks of electrical current at the proper instant.

V. Timers are used on, and are necessary parts of, internal-combustion engines that require the ignition of compressed gas. They are necessary whenever spark plugs are used, and were in common use on internal-combustion engines long before the advent of automobiles.

VI. During the times when the excise taxes aforesaid were paid by plaintiff, and for many years prior thereto, plaintiff made and sold two types of timers, one known as the "Milwaukee senior timer," and the other known as the "Milwaukee timer." The only essential difference between

these two types of timers was the means provided for attachment to the engines. The Milwaukee senior timer was made for engines of 1, 2, 3, 4, and 6 cylinders. The Milwaukee timer was designed for engines of 4 cylinders, but could be used with equal facility on engines of 1, 2, or 3 cylinders by merely connecting up as many contact points as there were cylinders. The Milwaukee timer was the same in construction and design and was made of the same materials, except that it was made with a steel shell up to February, 1924, and thereafter with a bakelite shell. The taxes herein in controversy were paid by plaintiff on both the Milwaukee senior timers and Milwaukee timers. Both of these timers could be, and were, used on various types of gasoline engines of four cylinders or less. In some cases a simple adjustment of the attachment place was necessary for installation.

VII. During all of the times when the excise taxes herein involved were paid Milwaukee timers were extensively advertised by plaintiff in the Saturday Evening Post and in farming, hardware, and automotive trade journals, also in magazines as follows:

"The standard replacement timer for Fords and Fordsons."

"Ford cars and Fordson tractors use the same type."

"In general use everywhere in Ford cars and trucks, and Fordson tractors."

"No other replacement makes a Ford car, truck, or Fordson tractor so much more efficient."

They were also advertised for use for "any gasoline engine," and "to suit any gasoline engine on the market."

VIII. The Milwaukee timer was attachable to all model T Ford engines, which engines were used on Ford cars, Ford trucks, and Fordson tractors. Milwaukee timers fit interchangeably on model T Ford engines and Fordson tractor engines.

IX. Many Ford model T engines were, prior to and during the period herein involved, sold by the manufacturer for installation in machines and equipment other than automobiles. Many engines were removed from automobiles and used for other purposes. During all of the times when the

excise taxes, herein involved, were paid by plaintiff, model T Ford engines were used as the power units for the following equipment: Light tractors, stationary power plants, farm cultivators, ice-harvesting equipment, bean-cleaning equipment, farm power plants, concrete mixers, fire-fighting apparatus, air compressors, locomotive equipment, hoists, shop mules, marine engines, street flushers, pumping, light grinding and saw equipment, etc. To such equipment the Milwaukee timer could be easily attached, and was frequently used on gasoline engines operating the above-enumerated equipment.

Fordson engines, the same being the engines that are used on Fordson tractors, were during all of the times when the excise taxes herein involved were paid by plaintiff, extensively used as the power units for stationary power plants, road graders, snow plows, road rollers, hoists, boats, saws, sprinklers, street sweepers, and locomotive equipment. To any such equipment the Milwaukee timer could be attached, and was frequently attached.

In addition to the uses above enumerated the timer manufactured by plaintiff during the times when the excise taxes were paid were extensively used on engines other than automobile engines, namely, on marine engines of special manufacture and also on tractors, cement mixers, and hoists.

X. Plaintiff did not sell any of its timers to automobile manufacturers. Practically all of the timers manufactured and sold by plaintiff during the times herein involved were sold through jobbers, who, in turn, sold to dealers. About forty per cent of the timers were sold through wholesale hardware jobbers. Many of them were sold to the manufacturers of marine engines. Due to the fact that the timers were sold through jobbers, who, in turn, sold them to dealers, plaintiff did not know, and it does not appear from the evidence, what percentage of the timers manufactured and sold during the period herein involved was used on automobile engines and what percentage was used on engines other than automobile engines.

XI. On February 6, 1925, plaintiff corporation filed a claim for refund of taxes in the sum of $159,296.77, with the collector of internal revenue at Milwaukee, Wisconsin,

which amount included the taxes involved in this section as well as other taxes not herein involved. This claim was disallowed and rejected by the Commissioner of Internal Revenue, in a letter dated January 13, 1926. Said matter was afterwards reopened and the claim was again disallowed and rejected by the Commissioner of Internal Revenue by letter under date of September 9, 1926, as follows:

"Reference is made to the claim filed by the Milwaukee Motor Products, Incorporated, 760 30th Street, Milwaukee, Wisconsin, for refund of $159,296.77, manufacturer's excise tax alleged to have been erroneously paid for the period April 1, 1919, to November 30, 1924, inclusive, which was rejected by this bureau on January 13, 1926. This case has been before the appeals and review section of the Miscellaneous Tax Unit on appeal from the action of the miscellaneous division in rejecting this claim.

"It is claimed that the timer manufactured by the Milwaukee Motor Products, Incorporated, is a commercial commodity and is used in farm tractors, road graders, concrete mixers, dump cars, hoisting engines, etc., in addition to automobiles. The evidence indicates that this timer can be used on any Ford engine whether such engine is used to propel an automobile or any of the various machines indicated using the Ford gasoline engine. The taxpayer contends that even though the bureau does not acquiesce in the decision of the Court of Claims in the case of the *Atwater Kent Manufacturing Company* v. *United States* (June 15, 1926), the timer manufactured by it does not come within the meaning of the provisions of the law for the reason that it is adapted to a wider range of uses than is the device which was considered by the Court of Claims in the Atwater Kent case. Therefore, the claimant contends, without regard to the decision mentioned, its article is not taxable.

"Examination of the special findings of fact appearing in the report of the decision in the Atwater Kent case discloses that the timing device considered by the court had a range of uses equally as wide as the one manufactured by the Milwaukee Motor Products, Incorporated.

"The timer manufactured by the claimant can be used only on a Ford engine. The court especially finds in the Atwater Kent case that the Atwater Kent timer is adapted to many different automobiles and other gasoline engines. Careful comparison of the evidence submitted in this case with the special findings of facts in the Atwater Kent case

fails to disclose any substantial difference in the devices as far as variety of users are concerned. The Milwaukee Motor Products, Incorporated, timer is no more a general commercial article than the Atwater Kent timer.

"In view of the fact that the Government expects to litigate the question further, it is considered that the rejection of this claim is correct, and such rejection is hereby sustained."

No part of the total sum of $118,045.19 has been repaid to the plaintiff.

The court decided that plaintiff was entitled to recover $118,045.19 with interest.

SINNOTT, *Judge*, delivered the opinion of the court:

This is a suit for the recovery of certain taxes on timers manufactured by plaintiff which it was required to pay to the United States under section 900 (3) of the revenue acts of 1918 and 1921 and 600 (3) of the revenue act of 1924. The wording of the revenue acts of 1918 and 1921, in so far as this issue is concerned, is identical as follows:

"* * * There shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

The provision of the revenue act of 1924 is also in almost identical language as follows:

"* * * There shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the

following percentage of the price for which so sold or leased:

"(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purpose of this subdivision, be considered to be a sale of the chassis and of the body.

"(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purpose of this subdivision, be considered to be a sale of the chassis and of the body.

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer, or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobile trucks, automobile wagons, or other automobiles."

The Commissioner of Internal Revenue refused to refund the amount collected. The case was referred to the commissioner of this court for a finding and report to the court of the facts.

No exceptions thereto were filed by either party. The court, after an examination of the evidence, has adopted the findings of the commissioner.

It appears to us that the issues in this case are practically identical with the issues involving timers in the case decided by this court in *Atwater Kent Manufacturing Co.* v. *United States*, 62 C. Cls. 419, and the decision in that case should be followed herein.

It was said in the *Atwater Kent case, supra:*

"The timers and coils involved here are, according to the findings, 'used on and are essential to the functioning of all internal-combustion engines that require the ignition of compressed gas'; 'they were manufactured in accordance with patented principles,' and 'an expert could not tell for what sort of engine a particular coil was to be used.'

Any of the timers and coils could, by a simple adjustment of the attachment plate, be used on engines other than automobile engines. Any particular timers might be attached to and used in automobiles or motor boats, airplanes, threshing machines, water pumps, or hoisting machines. The 'coil' was in use before automobiles were invented. It is used in association with the timer in the ignition system of a gas engine. It is apparent that the timers and coils 'are not specially designed nor primarily adaptable only for use on or in connection with automobiles, but that they are interchangeable and extensively used in many other industries,' to adopt the language of the Bureau of Internal Revenue relative to 'spark plugs.' See S. T. 426, December, 1923, C. B. p. 308. If the principle thus applied to 'spark plugs,' which were held not to be 'parts,' be applied to timers and coils the plaintiff is entitled to a judgment.

"The defendant argues that the timers and coils 'were parts when sold to make up the dealer's stock of parts; in fact, they were parts from the time they were manufactured to supply the well-known and ever-increasing demand for such parts.' But the question is not whether they were 'parts' of something after they were attached to the one or another kind of machine to which they were attached and in which they could function, but whether they were sold as parts of the articles mentioned in subdivisions (1) and (2) of section 900. We agree with plaintiff's contention that upon the facts found and undisputed these timers and coils were, when sold, 'well-recognized commercial articles, parts of the ignition system of a gas engine, but no more parts of automobiles than they were parts of marine engines or the other kinds of engines' mentioned. The context shows that the word 'parts' referred to in the acts was intended to have and should be given a restricted meaning."

The findings in the present case show that the timers involved had the same functions, and as wide and varied use, as the timers in the *Atwater Kent case*.

The timers manufactured by the plaintiff were extensively used on engines other than automobile engines. The Milwaukee timer was attachable to all model T Ford engines. These engines were used on Ford cars, Ford trucks, and Fordson tractors, and fit interchangeably on model T Ford engines and Fordson tractor engines.

The model T Ford engine was used, during all the times when the excise tax herein involved were paid, on light

tractors, stationary power plants, farm cultivators, ice-harvesting equipment, bean-cleaning equipment, farm power plants, concrete mixers, fire-fighting apparatus, air compressors, locomotive equipment, hoists, shop mules, marine engines, street flushers, pumping, light grinding and saw equipment, etc. To such equipment the Milwaukee timer could be easily attached, and was frequently used on gasoline engines operating the above-enumerated equipment.

The Fordson engines were extensively used as the power units for stationary power plants, road graders, snow plows, road rollers, hoists, boats, saws, sprinklers, street sweepers, and locomotive equipment.

In addition to the uses above enumerated, the timers manufactured by plaintiff, during the times when the excise taxes were paid, were extensively used on engines other than automobile engines, namely, on marine engines of special manufacture and also on tractors, cement mixers, and hoists.

The wide variety of uses of the timers involved herein, as indicated above, brings them clearly within the decision of the *Atwater Kent case*, *supra.* This is not denied by the Commissioner of Internal Revenue, as appears from his letter, set forth in Findings of Fact XI, wherein he states:

"Careful comparison of the evidence submitted in this case with the special findings of facts in the Atwater Kent case fails to disclose any substantial difference in the devices as far as variety of users are concerned."

We believe that this case should be determined by the doctrine announced in the *Atwater Kent case*, *supra:*

"Where the articles, as those we are concerned with, are applicable for use in different kinds of machines or appliances and are just as applicable to the one use as to the other they are not distinctively parts of automobiles so as to be taxable under these statutes."

The Milwaukee timers are clearly within this rule. Judgment should be awarded in favor of plaintiff. It is so ordered.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

ADVANCE AUTOMOBILE ACCESSORIES CORPORATION v. THE UNITED STATES [1]

[No. H-3. Decided October 22, 1928]

On the Proofs

Excise taxes; parts of automobiles; transmission linings cut to size.—The transmission lining produced by plaintiff, sold in cartons in convenient size for attachment to Ford automobiles, held to be a "part" thereof and subject to the excise taxes imposed by the revenue acts of 1921 and 1924.

The Reporter's statement of the case:

Mr. George M. Wilmeth for the plaintiff.

Mr. Ralph C. Williamson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Homewood, Illinois.

II. Plaintiff is engaged in the preparation and distribution, among other articles, of transmission lining for Ford automobiles. Some of this lining, about 3 per cent, is sold in bulk or rolls, but the majority of plaintiff's output is sold in cartons, each of which contains three strips cut to approximately the length of two feet, together with a sufficient number of rivets with which to attach said strips to the transmission bands. Plaintiff has not been required to pay the excise tax imposed by subdivision (3) of section 900 of the revenue act of 1921, or subdivision (3) of section 600 of the revenue act of 1924, on the sale of transmission lining sold in bulk or rolls, but between the dates of June 1, 1922, and February 26, 1926, there were levied, assessed, and collected from plaintiff, and paid by plaintiff, through the U. S. collector of internal revenue at Chicago, Illinois, taxes in

[1] Certiorari denied.

the amount of $32,768.35 on the sale of transmission lining sold in cartons as above described.

III. The transmission lining sold by plaintiff in cartons, each containing three strips as described in the next preceding finding, is cut to approximate length to fit the transmission bands on Ford cars, an allowance being made so that it is necessary in some instances for the person, whether car owner or repair man, who attaches the lining to trim the same to the requisite length to fit the bands. For use on the automobile it is only necessary to attach the strips by the rivets provided and to trim it off, as aforesaid, if there is any excess over the edges.

IV. On or about June 7, 1926, plaintiff filed with the Commissioner of Internal Revenue claim for refund of $32,768.35 representing taxes paid on the sale of said lining in cartons, which claim was rejected by the Commissioner of Internal Revenue under date of November 29, 1926.

V. The transmission lining is sold and distributed by plaintiff to and through the automobile accessory jobbing trade and is used by garage men, repair men, and a large percentage of it by car owners themselves to replace worn-out transmission linings.

The court decided that plaintiff was not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

During the period involved in this controversy plaintiff was engaged in the manufacture of transmission linings for Ford automobiles, and the sale of same to the automobile jobbing trade. Between the dates June 1, 1922, and February 26, 1926, plaintiff paid taxes in the aggregate sum of $32,768.35, same having been assessed under the provisions of subdivision (3) of section 900 of the revenue act of 1921, and subdivision (3) of section 600 of the revenue act of 1924. On June 7, 1926, plaintiff filed a claim for the refund of said taxes, which claim was rejected by the Commissioner of Internal Revenue. This is an action for recovery of said amount.

Opinion of the Court

Section 900 of the revenue act of 1921, 42 Stat. 227, is as follows:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

Articles 14 and 15 of Treasury Regulations No. 47, relating to the administration of the above act, are as follows:

"ART. 14. * * * The words 'tires, inner tubes, parts, or accessories, shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as 'tires, inner tubes, parts, or accessories,' and shall not be understood to embrace raw materials used in the manufacture of such articles. * * *

"ART. 15. *Definition of parts.*—A 'part' for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle. * * *"

Section 600 of the act of 1924 is similar in substance to that of 1921, and the regulations relating to same, so far as the question involved here is concerned, are identical.

The question for determination is whether or not plaintiff's product, as prepared and sold, constituted a part of a Ford automobile within the meaning of the acts above mentioned.

Opinion of the Court

Plaintiff was engaged in the business of making replacement parts for Ford automobiles, principally transmission lining, timers, and, for a portion of the time, shock absorbers. Material for the transmission lining, a woven product, was purchased by plaintiff in rolls from the manufacturer. Plaintiff dealt with three types of lining: (1) The "White Stripe," which is a plain woven lining; (2) the "Feltbak," which is the same type of lining, except that plaintiff placed a felt backing on it, to act as a cushion; and (3) the "Cork Feltbak," which is the same as the Feltbak, with the exception that cork discs are placed by plaintiff in the woven portions of the lining. The lining is then cut into strips of two feet each in length, which is the standard length of the Ford transmission band. There being three transmission bands in a Ford automobile, these strips, so prepared, are placed three in a package for sale, together with the requisite number of rivets by which the lining is attached to the band. The attachment of said lining requires no skill whatever and consists merely in properly placing the rivets and, in some instances, trimming the edges of the lining to the exact length of the band. It was sold only through the automobile jobbing trade, exclusively for use on Ford automobiles.

It is the contention of plaintiff that the product in question was merely repair material, and as such is not subject to the tax. We are unable to agree with this contention. In a general sense it is a repair material. In this connection it should be noted that a negligible portion, about three per cent of plaintiff's product, is sold in bulk, and no tax is exacted as to this portion. However simple may have been the preparation to which this article was subjected, it was a process which left nothing further to be done, except to place the rivets and trim the edges where the material joined. It was complete for the use for which it was intended. From a casual reading of the statute, it is plain, we think, that the word "parts," as used in the statute can be given no other than the ordinary meaning of that word as it is customarily used, and, applying that rule, we have reached the conclusion that the particular articles involved in this case, and upon which plaintiff paid taxes for a number of

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years, fall within the meaning of the term "parts." *Worth Bros. Company* v. *Lederer*, 251 U. S. 507.

The petition will be dismissed, and it is so adjudged and ordered.

Sinnott, *Judge;* Green, *Judge;* Graham, *Judge;* and Booth, *Chief Justice*, concur.

A. KREAMER, INC., v. THE UNITED STATES

[No. F-207. Decided December 3, 1928]

On the Proofs

Income and profits taxes; salaries paid to stockholders; pledge of stock to secure loan; bookkeeping entries.—In suit to recover taxes paid the plaintiff is not foreclosed by bookkeeping entries from showing its real transactions. Where certain payments to its principal stockholders, whose stock was pledged to secure a loan to the company, were carried on its books as loans, were payable out of surplus profits and charged against said stockholders' dividend accounts, if any, but the fact is that they were for services rendered and reasonable in amount, they were ordinary and necessary expenses within the meaning of the revenue laws and deductible from gross income.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized and existing under the laws of the State of New York.

II. For the year 1918 the plaintiff company made income and profits tax payments in the following amounts and on the following dates:

March 15, 1919	$8,000.00
June 14, 1919	7,594.52
September 15, 1919	7,581.87
December 13, 1919	7,581.86
April 13, 1921	.02
November 29, 1922	430.76
Total	31,189.03

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For the year 1919 the plaintiff company made income and profits tax payments in the following amounts and on the following dates:

March 15, 1920	$1,026.98
June 15, 1920	1,000.00
September 15, 1920	1,000.00
December 17, 1920	800.00
Claim in abatement filed December 17, 1920	200.00
Total	4,026.98

On August 10, 1921, the above claim in abatement in the amount of $200.00 was allowed in full, leaving the corrected income and profits tax to be $3,826.98.

For the year 1920 the plaintiff company made income and profits tax payments in the following amounts and on the following dates:

March 14, 1921	$170.28
June 15, 1921	170.28
September 14, 1921	170.28
December 15, 1921	170.28
Total	681.12

III. In computing its taxable net income for such years the plaintiff did not deduct as an expense of the business certain monies paid during these years by it to Charles J. Kreamer and August Kreamer, president and vice president, respectively. These monies were in the following amounts:

1918	$10,400.00
1919	10,400.00
1920	15,600.00

IV. On February 27, 1924, it filed with the collector of internal revenue, Brooklyn, N. Y., a claim for refund in the amount of $16,366.44 or such greater amount as should be legally refundable. The Commissioner of Internal Revenue on July 8, 1924, rejected plaintiff's claim for refund and assessed the following amounts of additional taxes:

1918 (interest, $192.61)	$1,980.80
1919 (interest, $90.15)	924.65
1920 (interest, $36.41)	373.55

These amounts were paid by the plaintiff on June 15, 1926. This underpayment of taxes as shown in the above assess-

ment letter of July 8, 1924, was based on the net income, which was shown by the returns to be in the following amounts:

1918	$68,638.41
1919	29,751.89
1920	12,546.73

V. The plaintiff corporation's business was originally the property of A. Kreamer. He died, leaving this business to his two sons, and it was thereafter conducted by them as a partnership. These two sons involved the partnership in financial difficulties, and the Manufacturers' Trust Company, which was the executor of the father's will and a loaner of money to the partnership, intervened in order to protect the estate and its loans. The trust company caused the business to be incorporated, dividing the 2,000 shares of stock of a par value of $100 per share equally between the two sons. It made additional loans to this new corporation which together with the prior loans to the partnership amounted to about $60,000.00. These loans were secured by a pledge of the sons' stock to the trust company. Three representatives of the trust company were elected to the board of directors, they together with the two Kreamers constituting the entire membership. The sons were elected to the presidency and vice presidency. The secretary of the trust company was made secretary of the plaintiff company. He was also one of the three representatives of the trust company on the board of directors.

VI. The two Kreamers assumed active charge of and gave their entire time to the details of purchase, manufacture, and sale, the trust company, through its representatives, controlling and directing the general policies and finances of the business. The amounts paid to them for such services were reasonable salaries.

VII. Following the incorporation the board of directors passed the following resolutions:

"*November 9, 1916. Resolved*, That there should be paid to August N. Kreamer and Charles J. Kreamer the sum of $75 a week for such services as they may be required to

render to the corporation, to be payable out of any surplus profits and to be charged against their divided accounts, if any.

"*November 25, 1918.* The financial condition of the company had improved and the indebtedness to the Manufacturers' Trust Company was paid down to the original demand note. The company bought U. S. Liberty bonds ($40,000), on which $11,500 had been paid. The accountant's statement showed profit sufficient to warrant the declaration of a dividend for the year.

"Upon motion made by Charles J. Kreamer and seconded by August N. Kreamer, it was unanimously voted to declare a dividend of eight per cent upon the capital stock of the company for the year 1918, to be paid December 2d, 1918, payment of this dividend to be contingent upon August N. Kreamer and Charles J. Kreamer repaying to the company all monies advanced them to the date of the dividend, upon their loan account.

"*January 6, 1919. Resolved,* That there should be paid August N. Kreamer and Charles J. Kreamer the sum of $100 each per week for such services as they may be required to render to the corporation, to be payable out of any surplus profits and to be charged against their dividend accounts, if any.

"*January 5, 1920. Resolved,* That there should be paid to August N. Kreamer and Charles J. Kreamer the sum of $150 each per week for such services that they may be required to render to the corporation, to be payable out of any surplus profits and to be charged against their dividend accounts, if any."

The trust company explains the above plan of payment by the statement that it could obtain a firmer grasp over the financial affairs of the corporation by this method in that these two officers were made to feel that the weekly payments were a part of dividends if declared rather than a part of the corporation's income, and that it would enable the trust company to curb the two officers' demands for increased salaries.

VIII. These amounts of $75, $100, and $150 were accordingly paid by check to each of the Kreamers each week as authorized, totaling for the three years involved the sum of $36,400.00. By direction of the trust company, the book-

keeper did not carry these payments in a salary account but carried them in a loan account. Notes, however, were not required of or made by the Kreamers to evidence these payments as loans.

Neither the Kreamers nor the trust company expected that any part of these monies would voluntarily be returned to the account of the company in the event that the dividends authorized were not sufficient in amount to cover these so-called "advancements."

IX. An 8% dividend amounting to $16,000.00 was declared for 1918; 12%, or $24,000.00, for 1919; and 10%, or $20,000.00, for 1920. When these dividends were declared, there was not enough money on hand to take care of the full payment of the dividends in the amounts declared. However, there was enough to pay the difference between the declared dividends and the total of the payments to the Kreamers. At the time these dividends were declared checks to the full amount of such dividends were made out by the company payable in equal shares to the Kreamers and delivered to the trust company. The Kreamers appeared at the trust company, endorsed the checks, and received an amount in cash equal to the difference between what they had received during the year and the amount of their dividend check for that year.

X. The tax returns evidencing the net income of the company were prepared by the plaintiff company's bookkeeper and signed by the president, Charles J. Kreamer. He disclaimed any actual knowledge of the methods by which the books were kept and any knowledge of what items of income and disbursement made up the figures set forth in the tax returns.

XI. The Kreamers sold all of their stock in 1922 and at that time severed their connection with the business.

XII. If the weekly amounts paid to the said Kreamers are properly deductible from gross income, the amount of tax which the plaintiff has paid exceeds by $11,173.47 the amount due from it. The various amounts which combined make

up the above sum, together with the dates of their payment, are as follows:

$1, 980. 80— 6/15/26.
430. 76—11/29/22.
.02— 4/13/21.
4, 785. 22—12/13/19.

7, 196. 80—Total for taxable year 1918.

934. 65— 6/15/26.
800. 00—12/17/20.
1, 000. 00— 9/15/20.
187. 35— 6/15/20.

2, 922. 00—Total for taxable year 1919.

373. 55— 6/15/26.
170. 28—12/15/21.
170. 28— 9/14/21.
170. 28— 6/15/21.
170. 28— 3/14/21.

1, 054. 67—Total for taxable year 1920.

11, 173. 47—Grand total.

The court decided that plaintiff was entitled to recover $11,173.47, with interest.

SINNOTT, *Judge*, delivered the opinion of the court:

During the calendar year 1918 the plaintiff paid to Charles J. Kreamer, its president, and to August Kreamer, its vice president, $100 a week each, aggregating $10,400. During the year 1919 it paid to each of these two officers similar amounts. During the year 1920 it paid to each of them $150 a week.

The plaintiff claims that these amounts so paid are deductible from its gross income, in determining its net income, under sec. 234 (a) (1) of the revenue act of 1918, 40 Stat. 1077, as compensation for services rendered for the purpose of computing its liability for income and profits taxes for each of the said years. The defendant claims that the said amounts were paid to these officers as and for dividends declared by it upon its capital stock.

The provision of the act of 1918, involved herein, is as follows:

"Sec. 234 (a). That in computing the net income of a corporation subject to the tax imposed by sec. 230 there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, * * *."

Plaintiff corporation's business was originally the propery of A. Kreamer. He died leaving this business to his two sons, above mentioned, who conducted it as a partnership. On the partnership's meeting financial difficulties, the Manufacturers' Trust Company, the executor of the father's will and a creditor of the partnership, intervened in order to protect the estate and its loans. The trust company caused the business to be incorporated, dividing the two thousand shares of stock, of a par value of $100 per share, equally between the two sons. It made additional loans to the new corporation. These loans were secured by a pledge of the sons' stock to the trust company. Three representatives of the trust company were elected to the board of directors; they, together with the two Kreamers, constituted the entire membership. The sons were elected to the presidency and vice presidency, respectively. The secretary of the trust company was made secretary of the plaintiff company, and also was one of the three representatives of the trust company on the board of directors.

The two Kreamers assumed active charge and gave their entire time to the details of purchase, manufacture, and sale. The trust company, through its representatives, controlled and directed the general policies and finances of the business.

The sums paid the two Kreamers weekly as aforesaid were by virtue of resolutions of the board of directors, which provided that said sums should be paid "for such services as they may be required to render to the corporation, to be payable out of any surplus profits and to be charged against their dividend accounts, if any."

The trust company explains this plan of payment by the statement that it could obtain a firmer grasp over the financial affairs of the corporation by this method in that these two officers were made to feel that the weekly payments were a part of the dividend, if declared, rather than a part of the corporation's income; and, further, that this plan would enable it to curb the demand for increased salaries on the part of these two officers.

The weekly payments to the two Kreamers, by direction of the trust company, were carried in a loan account, and not in a salary account. Notes were not required from the Kreamers to evidence these payments as loans. Neither the Kreamers nor the trust company expected that any part of these moneys would voluntarily be returned to the company in the event that the dividends authorized were not sufficient to cover the payments made to the Kreamers.

An 8% dividend amounting to $16,000.00 was declared for 1918; 12%, or $24,000.00, for 1919; and 10%, or $20,000.00, for 1920. When these dividends were declared, there was not enough money on hand to take care of the full payment of the dividends in the amounts declared. However, there was enough to pay the difference between the declared dividends and the total of the payments to the Kreamers. At the time these dividends were declared checks to the full amount of such dividends were made out by the company payable in equal shares to the Kreamers and delivered to the trust company. The Kreamers appeared at the trust company, endorsed the checks, and received an amount in cash equal to the difference between what they had received during the year and the amount of their dividend check for that year.

It is apparent to us that the sums paid to the Kreamers were for their services, and not dividends. They assumed active charge of and gave their entire time to certain details of the business. It was not to be expected that they were to donate their services. The resolutions specifically provide that the sums paid were to be *for their services*. The provision in the resolution that the sums were to be charged against their dividend accounts is explained by the trust com-

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pany on the ground that it would give the trust company a firmer grasp over the financial affairs of the corporation, and a curb on the demands of the two Kreamers for an increase in salaries.

While the bookkeeper carried the weekly sums paid to the Kreamers as a loan account, this fact is not conclusive. No notes were required of the two Kreamers. Neither did they nor the trust company expect any of these moneys voluntarily to be returned to the company in case the dividends were not sufficient to cover these payments. Charles J. Kreamer, the president, disclaimed any knowledge of the method by which the books were kept.

Plaintiff is not foreclosed by its bookkeeping entries from showing the real facts of the transaction.

"The fact that this item was not properly treated on its books does not foreclose the taxpayer's right to deduct it from income, since the books are merely *prima facie* evidence of the character of the charge." *Henry Myer Thread Manufacturing Co.*, 2 B. T. A. 665, 666.

"There is no question of good faith in regard to these entries; but it is well at the outset to realize that in this case the rights of the parties can neither be established nor impaired by the bookkeeping methods employed, or by the names given to the various items." *Douglas* v. *Edwards*, 298 Fed. 234.

"The fact that these amounts were not classified on the books as salaries is immaterial. They were paid as compensation for services." *Osborne & Clark Lumber Co.*, 8 B. T. A. 382, 383.

Mr. Shelton, vice president of the Manufacturers' Trust Company, who, during the years in question, was secretary and treasurer and also director of the plaintiff corporation, testified that the amounts paid to the Kreamers were reasonable amounts. The defendant offered no evidence to show that the amounts were not reasonable.

The plaintiff is entitled to recover. It is so ordered and adjudged.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

Opinion of the Court

EDMUND G. CHAMBERLAIN v. THE UNITED STATES[1]

[No. H-56. Decided December 3, 1928]

On Demurrer to Amended Petition

Tenure of office; general court-martial in foreign jurisdiction; sentence of dismissal; prosecution of case before Congress; laches.—Where an officer of the Marine Corps, dismissed from the service in consequence of general court-martial proceedings in a foreign jurisdiction, neglects to test the legality of his dismissal by application to the Secretary of the Navy or by suit in a court of competent jurisdiction for a period of nearly six years, the diligent prosecution of his claim to restoration of duty before Congress does not prevent his claim for salary from being barred in the Court of Claims by laches.

The Reporter's statement of the case:

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Mr. James J. Hayden, opposed.

The material averments of the amended petition are stated in the opinion.

GREEN, *Judge*, delivered the opinion of the court:

The amended petition, filed February 3, 1928, shows that prior to February 11, 1921, the plaintiff held a commission as captain in the United States Marine Corps; that having been tried and sentenced by a general court-martial to be dismissed from the service of the United States, on January 31, 1921, the President confirmed the sentence of general court-martial; on February 10, 1921, the plaintiff was ordered to report to the commanding officer at the marine barracks, Washington, D. C., in order to receive the judgment of the court-martial; that on February 11, 1921, the plaintiff so reported and received a letter dated February 1, 1921, from the Secretary of the Navy stating, "You are hereby dismissed from the naval service of the United States." Plaintiff acknowledged the receipt of this letter on the same day and received a voucher for his pay from the Navy Department up to nine o'clock a. m. of February 11, 1921.

[1] Certiorari denied.

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The petition further recites that the general court-martial by which the plaintiff was tried, and by which he was sentenced to be dismissed from the naval service of the United States, was held in part in London, England, and in part in Paris, France, during the months of March and April, 1919, in buildings and in places subject to the jurisdiction of the British Government and of the French Government, respectively; that said court-martial proceedings show on their face that they were held without legal authority, and that they were held in direct violation of the naval regulations made and provided for the conduct thereof, and were null and void; and specifically, that they were held in violation of section 215, page 183, of Naval Courts and Boards (1917 edition).

Plaintiff also alleges that during the years 1921 to 1925, inclusive, he prosecuted his case diligently before the Congress of the United States in order that he might be restored to duty as a captain in the United States Marine Corps, but in 1926 found it impossible to prosecute his case vigorously because of lack of funds.

Plaintiff further alleges that he has at all times been ready and willing to perform the duties of a captain in the Marine Corps, but has not been permitted so to do, and that he is justly entitled to be paid by the Government at the regular salary of a captain in the United States Marine Corps to the date of the filing of the petition in this case, or $21,600 in all.

The defendant demurs to the amended petition specifically on the ground that the claim is barred by limitations, and generally on the ground that it does not state a cause of action against the defendant.

It may be doubted whether the plaintiff's claim is barred by the statute of limitations. He was not actually dismissed until he received the order of the Secretary of the Navy on February 11, 1921, and the original petition was filed on February 10, 1927. It is not, however, necessary to determine this question if his claim is barred by laches.

It appears that about six years had elapsed after the dismissal of the plaintiff before suit was brought in this court. Assuming, as we must for the purpose of ruling on the

demurrer, that plaintiff's dismissal was wrongful, he was nevertheless required to be diligent in the assertion of his right to the office or the compensation attached thereto. In *Nicholas* v. *United States*, 257 U. S. 71, 76, the court said:

"Public policy requires that the Government shall be seasonably advised of the attitude of its officers and employees attempted to be displaced when they assert illegal removal or suspension as a basis for the recovery of the office or its emoluments."

In that case there was a delay of three years after the plaintiff's removal from the office and he was held to be barred from asserting his claim by laches. In the case of *United States Ex Rel. Arant* v. *Lane*, 249 U. S. 367, twenty months' delay was held sufficient to bar the action of the plaintiff. In *Norris* v. *United States*, 257 U. S. 77, so short a delay as eleven months was held to bar the plaintiff's action. A number of other cases could be cited to the same effect.

The plaintiff contends that these decisions are not applicable to his case for the reason that he prosecuted his case diligently before the Congress of the United States during the years 1921 to 1925, inclusive, and found it impossible to carry on his case vigorously thereafter for want of funds.

We do not think this action was sufficient to prevent his claim from being barred. The petition fails to show any application for reinstatement or that the Secretary of the Navy was notified of his desire therefor or for revocation of the order of his dismissal. In short, the petition fails to show that the plaintiff took any steps to question the order dismissing him from the service except to apply to Congress for action on its part that he might be restored to duty in his former position. But in our view, the proceedings before Congress were not sufficient. His claim in the petition is that he was unlawfully discharged and the proper way to test this was by application to some court of competent jurisdiction if he considered application to the Secretary of the Navy useless. The proceedings before Congress, whether by petition or by appearance before a committee, or in whatever form they may have taken, were not

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of such a nature that the Secretary of the Navy or the President was obliged to take notice thereof. In the case of *O'Neil* v. *United States*, 56 C. Cls. 89, 95, the court said:

"The rule above quoted requires the appointing power when he exercises his right of removal to follow a certain course of action. A duty is imposed upon the officer, but if he ignores it and removes a person from office, his action is not thereby illegal, nor is the removal rendered void and of no effect, nor can the person so removed claim that he has not been removed, and that he is entitled to continue in the office, to perform the services of the office, and to receive the compensation attached to it. As a matter of fact, he is removed; he ceases to be in the service of the United States, and his only remedy is to proceed without delay in a court of competent jurisdiction to try his right to the office. This the plaintiff did not do and never has done."

We agree with the decision in that case as to the remedy of plaintiff. He failed to exercise his remedy, but without excuse left the Government in such a situation that if his claim was sustained two salaries would be paid for a single service. In the language used by the court in *Arant* v. *Lane*, *supra*—

"the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy."

The demurrer must be sustained, and it is ordered that plaintiff's petition be dismissed.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JONESBORO GROCER CO. v. THE UNITED STATES

[No. E-562. Decided December 3, 1928]

On the Proofs

Refund of income and profits taxes; claim under section 252, revenue act of 1921; claim for special assessment; statute of limitations.—Section 252 of the revenue act of 1921 relates to mistakes in overpayment appearing on the face of the return itself, discoverable by the examination provided for in section

250 (b), directing the proper credit of the excess payment, and the immediate refund to the taxpayer of any balance of such excess. Upon the expiration of five years from the date when the return was due the Commissioner of Internal Revenue is precluded by the proviso of said section from allowing or making such credit or refund unless claim for an overpayment so appearing has already been filed, and such a claim, so filed, when it has no reference to a special assessment under section 210 of the revenue act of 1917, is not sufficient to entitle the taxpayer to the relief provided thereunder. And although it contains the alternative, "or such greater amount as is legally refundable," it is restricted to the matters relied upon and not to the special assessment feature. Nor is the taxpayer entitled to the special assessment where a specific claim therefor, filed after the statute of limitations has run, is allowed by the Commissioner of Internal Revenue, but thereafter rejected upon discovery of the failure to file within the statutory period.

The Reporter's statement of the case:

Mr. Donald Horne for the plaintiff.

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Jonesboro Grocer Company was organized under and by virtue of the laws of the State of Arkansas, prior to the year 1917, and ever since has been and now is a corporation duly organized and existing under the laws of the State of Arkansas with its principal place of business at Jonesboro, Arkansas.

II. On March 23, 1918, plaintiff filed with the United States collector of internal revenue its income and profits tax return for the calendar year 1917. On June 17, 1918, it paid the taxes therein shown to be due, amounting to $19,708.79.

III. On or about July 23, 1919, the plaintiff duly filed in the office of the Commissioner of Internal Revenue an amended income and profits tax return for the calendar year 1917, and its claim for refund of $424.35, or such greater amount as was legally refundable on Form No. 46,

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revised March, 1918, provided by the Treasury Department for the purpose. Said claim stated as reasons for refund:

1. That in the plaintiff's income and excess-profits tax return for the year 1917, as filed, the plaintiff used only 8% deduction of invested capital, whereas it was entitled to 9%; and
2. That in said return the income was overstated in the failure to report and deduct the full amount of State, county, and city taxes paid.

There was no claim made therein that plaintiff's tax should have been determined under the provisions of section 210 of the revenue act of 1917.

IV. Under date of March 22, 1921, the Commissioner of Internal Revenue advised the plaintiff that an examination of its income tax returns for 1917 and 1918 indicated an overpayment of $1,322.16 for the year 1917.

V. Under date of April 9, 1921, the Commissioner of Internal Revenue advised the plaintiff that its said claim for refund was rejected, but that its 1917 tax was reduced in the amount of $1,322.16, as an indicated net overpayment for 1917 by way of a credit against additional taxes of the plaintiff found due for 1918.

VI. By communication dated April 12, 1921, plaintiff advised the Commissioner of Internal Revenue as follows:

APRIL 12, 1921.

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

HONORABLE SIR:

In re Letter March 22, 1921.
IT: G: FAR: COGI.
Tax returns years 1917 and 1918.
Rev. agent's report Nov., 1919, and supplemented later in 1920.

This acknowledges receipt of letter from the Treasury Department dated March 22, 1921, as referred to above. It is noted that the Revenue Bureau, after an examination of the tax return filed by the Jonesboro Grocer Co. for 1917 and 1918, in connection with the revenue agent's report, sets out that for year 1917 there is an overpayment of $1,322.16 and for 1918 there is an additional tax due of $3,549.39, making a net total due of $2,227.23.

Relative to the year 1917 we are making no exception to the adjustments made for this year, and will accept the recommendation for overpayment in the amount stated of $1,322.16.

VII. On March 15, 1924, the plaintiff filed with the Bureau of Internal Revenue on Treasury Department Form 843, January, 1922, which was furnished by the said department, an application for a redetermination of its profits tax for 1917 under the provisions of section 210 of the revenue act of October 3, 1917, and claimed a refund thereunder of $10,000, or such greater amount as was legally refundable, and stated in said application that the tax assessed against it, in its opinion, was higher than that paid by representative competitive concerns, which created an inequality and placed it at a disadvantage in meeting competition, and that the reason such a condition existed was that unusual and abnormal conditions had affected its income and capital.

VIII. By letter dated August 18, 1924, the Commissioner of Internal Revenue advised plaintiff in part as follows:

"You are advised that after careful consideration and review your application for assessment of your excess-profits tax for the year 1917, under section 210 of the 1917 act and for assessment of your profits tax for the year 1918, under section 328 of the revenue act of 1918, has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company," and that the audit showed an overassessment of $5,725.70 income and profits tax for 1917, which would be made the subject of certificates of overassessment.

IX. Under date of December 30, 1924, the Commissioner of Internal Revenue advised the plaintiff with reference to his previous advice of August 18, 1924, that "since no claim for assessment under section 210 of the revenue act of October 3, 1917, was filed within the limitation imposed by section 281 of the revenue act of 1924, the indicated overassessment for 1917 may not be adjusted," and said claim for refund was in terms rejected.

Opinion of the Court

X. No part of the $5,725.70 overassessment referred to in the commissioner's letter of August 18, 1924, was ever refunded to the plaintiff.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

On March 23, 1918, plaintiff, Jonesboro Grocer Company, filed its income and excess-profits tax return for the year 1917 and paid the taxes shown to be due thereon, amounting to $19,708.79. On July 23, 1919, plaintiff filed an amended return for the said year 1917, and at the same time filed a claim for refund of $424.35, this amount being the difference between the tax shown on its original and its amended returns. The claim was rejected. The Commissioner of Internal Revenue determined, however, that plaintiff had overpaid its tax for 1917 and allowed an overassessment for that year of $1,322.16, and that there was an additional tax due of $3,543.39 for the year 1918, making a net total of tax due amounting to $2,227.23, which was credited to plaintiff's taxes for the year 1918. On March 15, 1924, almost six years after the payment of the tax for 1917, plaintiff filed a second claim for refund, in which it was requested that its profits tax be redetermined under the provisions of section 210 of the revenue act of October 3, 1917, on the ground that the tax assessed against it was higher than that paid by representative competitive concerns, due to unusual and abnormal conditions affecting plaintiff's income and capital. In a letter dated April 18, 1924, the Commissioner of Internal Revenue advised plaintiff that its application had been granted and that a recomputation of its tax under section 210 showed an overassessment of $5,725.70, and that such overassessment would be made the subject of certificates of overassessment, which would be forwarded in due course through the office of the collector of internal revenue for plaintiff's district. Thereafter plaintiff was advised by letter dated December 30, 1924, that prior to scheduling the certificates in question to the collector of internal revenue it was disclosed that "no claim for the refund of the 1917

Opinion of the Court

indicated overassessment was filed within the limitation imposed by section 281 of the revenue act of 1924, and both certificates were held in abeyance pending the determination of this fact.

"You are, therefore, advised that since no claim for assessment under section 210 * * * was filed within the limitation imposed by section 281 of the revenue act of 1924, the 1917 indicated overassessment may not be adjusted * * *." The claim was, in terms, rejected.

It is provided in section 281 (b) 43 Stat. 301, as follows: "Except as provided in subdivisions (c) and (e) in this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, * * *."

It seems to be the contention of plaintiff that the claim upon which this suit is predicated is controlled by the provisions of section 252 of the revenue act of 1921, 42 Stat. 268. In order to obtain a clearer understanding of the purpose and intent of Congress in the enactment of section 252, that section must be considered in connection with section 250 (b) of the same act, which reads as follows: "As soon as practicable after the return is filed the commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252." Section 252, omitting irrelevant portions, reads as follows: "That if upon examination of any return made pursuant to * * * the revenue act of 1917 * * * it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installments thereof,

then due from the taxpayer, under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided, however*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years, a claim therefor is filed by such taxpayer." It is obvious, we think, that section 252 was intended to relate to mistakes in overpayment appearing on the face of the return itself, discoverable by the examination provided for in section 250 (b), directing the proper credit of the excess payment, and the immediate refund to the taxpayer of any balance of such excess. It means that Congress intended that the examination by the commissioner of such return should not, in any event, be prolonged beyond the period of five years from the date of the return, and that said commissioner should not, after that period, allow such refund unless a claim therefor had been filed within the five years. The contention is urged that the words, "claim therefor," as used in the above proviso refers to the words, "amount paid in excess of that properly due," and that the plaintiff complied with the requirements of section 252 when it filed in 1919 its claim for the refund of a stated sum, or "such greater amount as is legally refundable." The contention that the later claim for refund should relate back to the 1919 claim is illogical and unsound. The 1919 claim, although specifically rejected, was adjusted to the perfect satisfaction of the taxpayer, as shown by a letter dated April 12, 1921, in which it was stated: "Relative to the year 1917 we are making no exception to the adjustments made for this year, and will accept the recommendation for overpayment in the amount stated of $1,322.16." The controversy growing out of that claim was thus effectually closed. The language, "or such greater amount as is legally refundable," must be held to relate to the matters relied upon in the claim for refund. Certainly it can not reasonably be contended that a claim for refund based upon the right to relief under the special assessment section could have any sort of relation to the grounds asserted in the 1919 claim for the refund of $424.35. If the principle contended for by plaintiff on this point is correct, the limitations imposed by Con-

gress on the time within which claims for refund may be asserted, and actions thereon instituted, would be completed annulled.

Plaintiff's claim sued on herein is specifically barred by the very section on which plaintiff relies, section 252 of the act of 1921. In the language "no such credit or refund shall be allowed," etc., *such credit or refund* can refer only to the credit or refund for which plaintiff is now contending, and the only claim for same was filed almost six years after the return was made. Section 3226 of the Revised Statutes as amended by section 1014 of the revenue act of 1924, 43 Stat. 343, provides that "No such suit * * * shall be begun * * * after the expiration of five years from the date of the payment of such tax * * * unless such suit * * * is begun within two years after the disallowance of *the part of such claim to which such suit or proceeding relates.*" (Our italics.)

The claim of July, 1919, does not include any part of the claim to which this suit relates. The claim to which this action relates was filed March 15, 1924, long after the prescribed period for filing a claim for refund.

Plaintiff's legal status is not affected in any manner by the action of the commissioner in advising plaintiff that consideration had been given to its second claim under section 210 and that a recomputation and audit showed an overassessment of $5,725.70. The final action of the commissioner was the rejection of the claim, due to the fact that no claim for such refund had been filed within the prescribed time. A few of the cases which sustain defendant's contention are as follows: *Nichols* v. *United States*, 7 Wall. 122, 130; *Cheatham et al.* v. *United States*, 92 U. S. 85; *Hicks* v. *James*, 48 Fed. 542 (this case was affirmed by the United States Supreme Court in *James* v. *Hicks*, 110 U. S. 272); *Kings County Savings Institution* v. *Blair*, 116 U. S. 200; *Rock Island A. & L. R. R. Co.* v. *United States*, 254 U. S. 141. Plaintiff is not entitled to recover, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

GREELEY IRON WORKS v. THE UNITED STATES

[No. F-79. Decided December 3, 1928]

On the Proofs

Contract for construction work; liquidated damages; mutual delay; absence of proof of date from which liquidated damages were to run; absence of proof of actual damages.—Where a construction contract provides for liquidated damages in case the work is not completed at the date agreed upon, and delays in the performance of the contract are mutual, the initial delay, being due to the fault of the Government, the contractor, in the absence of proof of actual damages, and of facts showing the date, due to the Government's delay, from which liquidated damages are to run, may recover the full contract price.

The Reporter's statement of the case:

Messrs. James H. Croxdale and *Rufus W. Pearson* for the plaintiff.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The Greeley Iron Works, Inc., plaintiff herein, is now and was during all of the times hereinafter mentioned, a corporation duly organized under the laws of the State of New York, for the purpose of manufacturing iron work and carrying on a general construction business, with its principal office and place of business at 449–451 West 38th Street, New York City, New York.

II. On September 26, 1923, plaintiff, in response to the advertisement therefor, entered into a contract with the United States through General Frank T. Hines, Director of the United States Veterans' Bureau, by the terms of which plaintiff agreed to furnish all labor, equipment, and materials, and to do and perform all the work required under said contract, for the erection and completion of two fire escapes on buildings known as No. 3, U. S. Veterans' Hospital No. 81, Bronx, New York City, for the sum of $10,-587.00, and to complete the same, within seventy-five (75)

days from the date of notice to begin construction work. Article 11 of said contract provides as follows:

"*Liquidating damages.*—The damages that may result from any delay in completion of any work by the time agreed upon will be difficult, if not impossible, of ascertainment. If any work is not completed on or before the date fixed for its completion by the terms of this contract, or by the date arrived at by any extension of time that may be allowed under the terms of this contract, the contractor shall pay to the Government as fixed, agreed and liquidated damages the sum of *ten dollars* ($10.00) for *each* calendar *day's* delay until the work is satisfactorily completed, or until such time as the Government may reasonably procure the completion of the work by another contractor, or complete the work itself. Whatever sums may be due as liquidated damages, for delay, may be *deducted* from payments due to the contractor or may be *collected* from the contractor or his sureties. The above provision for liquidated damages shall not prevent the Government from terminating the right of the contractor to proceed in case of default."

A copy of said contract marked "Exhibit A," is attached to the petition and made a part of this finding by reference.

III. By the terms of the contract plaintiff was required to execute a bond before proceeding with the work. It does not appear from the evidence just when this bond was executed and delivered to the representatives of the Veterans' Bureau, but it was several days after the contract was executed. After furnishing the bond plaintiff was duly notified by letter of October 13, 1923, to begin work, which letter was received by plaintiff on October 16, 1923.

IV. At the time plaintiff was notified to begin work it had on hand the greater part of the material necessary to be used in the performance of the contract. Plaintiff had assembled its men and material when, after taking measurements, it discovered errors had been made in the plans and specifications and that a satisfactory structure could not be erected according to the plans as prepared by the Government. The president of plaintiff company made a trip to Washington and suggested certain changes in the plans and specifications. As a result of these suggestions certain

changes in the plans and specifications were made and agreed to by the representatives of the Veterans' Bureau. Under date of October 23, 1923, the amended plans and specifications were approved by General Frank T. Hines, Director of the Veterans' Bureau, and notice to proceed with the work under the revised plans was received by plaintiff on October 24, 1923. At the time said revised plans were adopted by the Veterans' Bureau it was understood and agreed by and between the parties that the performance of the work under the revised plans would not increase the cost to the Government, and no claim is made in this action for any increased cost for the work of performance.

V. Due to the fact that the revised plans were not approved until October 23, 1923, plaintiff could not and did not begin the work of performance until October 24, 1923. Some of the material necessary in the performance of the work under the revised plans had to be ordered from the mill and this delayed the contractor in the performance of the contract. It does not appear from the evidence just how long contractor was delayed but it required about two weeks to get the stringers designated in the revised plans, and it required something like four weeks to get the diamond checkered plates for the steps and platforms. It also required about six weeks to get the screen guards and uniform locks from the mills. As a result of the delay in securing the material designated in the revised plans the performance of the contract was extended into the winter months of 1923–24. During the greater part of the winter months the weather was good for outdoor work, but at times low temperature and snow and sleet hindered the work. It does not appear from the evidence just how many days the work was delayed by reason of the condition of the weather.

During this period the representatives of the Veterans' Bureau made numerous complaints in writing to plaintiff in reference to the slow progress of the work and urged plaintiff to increase its force of men and to complete the same at the earliest possible moment.

There were many days during the winter of 1923–24 when plaintiff could have increased its force of men and made much greater progress in the performance of the work than it did make with the force that it kept at work.

The delays in the performance of the contract were mutual. The contractor was delayed for the period from October 16, 1923, to October 24, 1923, by the changing of the plans and specifications. Some of the changes suggested by the plaintiff were made for the convenience of the plaintiff, but certain changes suggested were necessary on account of the original plans being defective in certain particulars. There was a delay from June 22, 1924, to June 28, 1924, due to the fact that the inspector of the work failed to inspect the same until June 28, 1924.

If plaintiff had increased its force of men on the job it could have completed the contract at an earlier date than it was completed.

VI. The work was completed on June 21, 1924, but the Government inspector did not make the inspection of the work, and accept the same, until June 28, 1924, which was one hundred and eighty-one (181) days after the time the work should have been completed under the contract.

Contractor made no application for extensions of time by reason of the changes in the plans or by reason of any of the delays.

There is no evidence of loss actually sustained by the defendant by reason of plaintiff's alleged delays.

VII. The contract price for the work performed was $10,587.00. Contractor was paid $8,802.00, leaving a balance of $1,785.00 of the contract price. Subsequent to the completion of the work contractor submitted a voucher for $1,785.00 as the unpaid balance of the contract price. By letter of August 15, 1924, the Veterans' Bureau informed the contractor that the unpaid balance of the contract price would be withheld against the sum of $1,810.00, due the United States for liquidated damages, and requested the contractor to remit the sum of $25.00 to cover the balance due the United States on account thereof. Contractor

failed to remit the sum of $25.00 and submitted a claim for the sum of $1,785.00 to the General Accounting Office, which claim was disallowed by the General Accounting Office, and a balance of $25.00 was certified as due the United States.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The plaintiff, a corporation, on September 26, 1923, entered into a contract with the United States by which it agreed to furnish labor, equipment, and materials, and to do and perform all work under said contract for the erection and completion of two fire escapes on buildings. The contract was to be completed within 75 days from the date of notice to begin construction work. The plaintiff received its notice to begin work on the 16th of October, 1923. At the time it was notified it had on hand the greater part of the material to be used in the performance of the contract. Plaintiff had assembled its men and materials when, after taking measurements, it discovered that errors had been made in the plans and specifications, and a satisfactory structure could not be erected according to the plans prepared by the Government. It suggested certain changes in the plans and specifications, which suggestions were accepted by the Government, and amended plans and specifications were prepared under date of October 23, 1923, and on October 24, 1923, the plaintiff received notice to proceed with the work. Owing to these changes necessary in the plans and specifications, additional material had to be ordered, some of which could not be gotten for two weeks, other material required four weeks, and other material six weeks, all of which further delayed the plaintiff, just how much does not definitely appear. The plaintiff proceeded with the work and completed it on June 21, 1924, but the Government did not inspect it and accept the same until the 28th of June, 1924.

There was a provision in the contract for liquidated damages at the rate of $10 per day for each calendar day's delay after expiration of the time fixed in the contract for completion until the contract was completed. The defend-

Syllabus

ant assessed liquidated damages for 181 days and withheld $1,785, a part of the contract price for the performance of the work, and for this sum plaintiff is suing here.

The findings show that the initial delay was due to the fault of the Government in preparing defective plans and specifications. This changed the date from which liquidated damages were to run under the contract, and there is no way under the facts for the court to fix another date. The completion of the contract was extended beyond the time fixed through the fault of the defendant, and the right to assess liquidated damages under the provisions of the contract was thereby annulled. If there was any loss by reason of subsequent delays, there must be proof of the loss actually sustained, and there is no such proof here. See *New York Continental Jewell Filtration Co.* v. *United States*, 55 C. Cls. 288, 296; *United States* v. *United Engineering & Contracting Co.*, 234 U. S. 236, 243; *Camden Iron Works* v. *United States*, 51 C. Cls. 9.

The plaintiff is entitled to recover the sum of $1,785.00, the amount claimed in the petition. Let judgment be entered for this amount.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

ELECTRIC BOAT COMPANY v. THE UNITED STATES

[No. D-795. Decided December 3, 1928]

On the Proofs

Fixed-price contracts; construction of ships; forced increase in wages; agreement to reimburse.—Plaintiff had numerous contracts with the Navy Department, entered into prior to the war, all at fixed prices, for the construction of submarine torpedo boats. Due to wage increases by the Shipbuilding Labor Adjustment Board on other work, plaintiff was compelled, in order to avoid labor troubles and complete the vessels, to pay like increases on its fixed-price contracts, the work extending into the period of hostilities, and the Secretary of the Navy thereupon agreed to pay to the plaintiff the cost of such wage increases, but,

because there was a question of legal liability therefor, made no reimbursement. *Held*, that under the *Bliss case*, 275 U. S. 509, there existed a valid contract to reimburse the contractor the loss sustained.

Same; computation of damages.—Damages are not to be denied because they may not be susceptible to indisputable accuracy. The test to be applied is: Have the sums claimed been calculated upon a reasonable basis, and under all the circumstances of the case does the claimed amount reflect the proximate injury?

Pleadings; necessity of count.—The Court of Claims is authorized under its forms of pleading to award a judgment in accord with the facts stated and proven, notwithstanding the absence of a count in the pleadings for the particular recovery.

Jurisdiction; sec. 8, act of March 4, 1925.—Section 8 of the act of March 4, 1925, 43 Stat. 1269, 1273, authorizing the Secretary of the Navy to investigate and report upon claims under certain fixed-price contracts, does not afford exclusive relief or create an exclusive forum.

The Reporter's statement of the case:

Mr. John S. Flannery for the plaintiff. *McKenney, Flannery & Craighill* and *Stroock & Stroock* were on the briefs.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, a corporation created and existing under the laws of the State of New Jersey, having its principal office in the city and State of New York, and its principal plant and seat of operations in Groton, State of Connecticut, is now and was at the time of the events hereinafter mentioned engaged in the manufacture of submarine torpedo boats.

II. In the years 1915, 1916, and 1917 the plaintiff entered into formal written contracts with the defendant for the construction of thirty-two submarine torpedo boats, designated as *AA-1* to *AA-3*, *O-3* to *O-10*, *R-1* to *R-20*, and *S-1*. Copies of all of said contracts, marked "Exhibits A-1 to A-32," both inclusive, were filed with the petition, were given in evidence, and are made a part of these findings by reference. The general provisions were substantially identical in

all of the contracts. A difference in verbiage, however, may be noted in the clauses relative to changes.

The contract of the *AA-1* was entered into March 19, 1915, and called for the completion of the vessel March 19, 1918 (which time was later extended), at a fixed price of $1,350,000.

The eight contracts covering *O-3* to *O-10*, inclusive, were entered into January 3, 1916, and called for the completion of the vessels in November and December, 1917, and January and February, 1918, which dates were subsequently extended to April and July, 1918, at a fixed price of $548,000 each.

The two contracts for *AA-2* and *AA-3* were entered into October 2, 1916, and called for the completion of the vessels October 2 and December 2, 1918, which time was extended, at a fixed price of $1,494,000 each.

The fourteen contracts covering *R-1* to *R-14*, inclusive, were entered into January 8, 1917; under contracts covering *R-1* to *R-9*, inclusive, the fixed price was $692,000, and under the contracts covering *R-10* to *R-14*, inclusive, $697,000. These contracts called for the completion of the vessels from March to September, 1919, which dates were subsequently extended to April, 1919, and December, 1919.

The six contracts covering *R-15* to *R-20*, inclusive, were entered into January 8, 1917, and called for the completion of the vessels from December, 1918, to February, 1919, at a fixed price of $697,000 each.

The contract for the *S-1* was also entered into January 8, 1917, and called for the completion of the vessel in May, 1919, which time was subsequently extended to June, 1920, at a fixed price of $1,189,000.

All of the contracts for the R and S boats provided for a bonus or premium for expedition.

III. After the execution of said contracts the plaintiff made subcontracts for the construction of the hulls and certain portions of the machinery with the Fore River Shipbuilding Company, of Quincy, Massachusetts, and the Union Iron Works, of San Francisco, California, subsidiaries of the Bethlehem Shipbuilding Corporation, and for the manufacture of the Diesel engines and certain other parts of the vessels by the New London Ship & Engine Company, of

New London, Connecticut, a subsidiary corporation controlled by the plaintiff. All of these subcontracts provided for payments to the subcontractor on a "cost-plus" basis.

The plaintiff, from time to time, made various changes and modifications in the design and construction of the vessels at the request of the defendant, fully complied with all of the defendant's requirements regarding inspections and tests, and delivered each of the vessels to the defendant upon the dates set forth in Paragraph IV of the petition, upon which dates the defendant accepted said vessels and has ever since had the full use, benefit, and value thereof.

Thereafter the plaintiff, as required by the guaranty provisions of the said contracts, remedied and made good all defects, deficiencies, etc., which the defendant brought to its attention after the conditional acceptance of the vessels, and was paid by the defendant, from time to time, the fixed prices named in each of said contracts, less a reservation of about $500 from the contract price for the vessels *O-3* to *O-10*.

At the time of receiving such payments no releases were given by the plaintiff, except in the case of the *S-1*, where a conditional release was given, reserving plaintiff's claim for wage increases, retroactive wages, and police protection.

IV. The entrance of the defendant into a state of war, April, 1917, marked the beginning of an abnormal condition, which persisted during a large part of the remaining time required to perform the work under the terms of the contracts in question.

The President's proclamation of March 22, 1917, suspending the provisions of the eight-hour working day limitation, theretofore contained in Government contracts set a new standard for labor both as to hours and overtime wages, and to hold its men from going on strike or seeking more remunerative employment elsewhere, plaintiff was forced to meet this new standard.

In addition, the defendant entered upon a large destroyer-building program and gave this program precedence over all other classes of naval construction. Two of plaintiff's subcontractors, the Fore River Shipbuilding Company and the Union Iron Works, had contracts for some eighty-five

of these destroyers, and the work at these plants on the submarines was, as a result, delayed.

The extraordinary demands for labor resulted in the necessity for using unskilled labor and comparatively unskilled supervision. This added to the cost by adding to the length of time required to complete the work.

V. By an agreement dated August 20, 1917, and amended December 8, 1917, between the Secretary of the Navy, the chairman of the U. S. Shipping Board, the general manager of the Emergency Fleet Corporation, and officers and representatives of several of the unions whose trades were involved, there was created a body known as the Shipbuilding Labor Adjustment Board. Reference to the provisions of this agreement is hereby made. Neither the plaintiff nor its subcontractors were parties to this agreement.

This board was established for the purpose of adjusting disputes which might arise concerning wages, hours, and working conditions of labor engaged in the construction or repair of shipbuilding plants or of hulls and vessels in the shipyards under contract with the Emergency Fleet Corporation or the U. S. Navy Department. This board proceeded to function, and on November 4, 1917, established a minimum-wage scale for the Pacific coast, retroactive to September 22, 1917. Other decisions affecting wage scales followed from time to time.

The plaintiff was from time to time advised of the decisions, but in no one of these communications does it appear that the plaintiff was ordered to conform to the wage scale as set. The plaintiff and its said subcontractors put these wage scales into effect, however, and paid the men in accordance therewith. The condition of the labor market during this period required the plaintiff and its subcontractors to meet these new standards so as not to be embarrassed by strikes or losses of large numbers of workmen.

The plaintiff also authorized the Bethlehem Shipbuilding Corporation to make these wage scales effective at the plants of its subsidiaries, the aforesaid subcontractors of the plaintiff.

Beginning in 1917 and running through 1918, the foremen engaged upon destroyers at the Fore River plant of

the Bethlehem Shipbuilding Corporation, with the approval of the Navy Department, were paid a bonus to expedite the work, and the plaintiff therefore found it necessary to pay a similar bonus to its foremen engaged upon the construction of submarines, inasmuch as the same foremen were working upon the same classes of boats in the same yard.

VI. Under date of March 29, 1918, the plaintiff, through its vice president, L. Y. Spear, wrote to the Secretary of the Navy the following:

MARCH 29, 1918.

WAGE INCREASES

Honorable SECRETARY OF THE NAVY,
Navy Department, Washington, D. C.

SIR: 1. We beg to call your attention to the situation which has arisen with respect to our fixed-price contracts for the following submarines, viz:

R-15 to *20*, building at the Union Iron Works, San Francisco, California.

R-1 to *14*, building at the Fore River Works, Quincy, Massachusetts.

O-3 to *10*, building at the Fore River Works, Quincy, Massachusetts.

AA-1, *2*, and *3*, building at the Fore River Works, Quincy, Massachusetts.

S-1, building at the Fore River Works, Quincy, Massachusetts.

Engines and other parts for *S-18* to *41* at N. L. S. & Engine Company.

The machinery for these vessels is being constructed by our subcontractors, the New London Ship & Engine Company, Groton, Connecticut.

2. In both of the above-mentioned shipyards wages have been increased by direct governmental action, and in consequence of this action it has been necessary for the New London Ship & Engine Company to correspondingly increase its wages or otherwise it could not hold its men.

3. Under these circumstances and following the precedent set in other cases, we assume that the department will be willing to defray the increased costs involved by these increases in wages, and we have under preparation the data necessary to enable us to take the matter up in detail with the department.

4. At the present moment it is generally understood that an additional wage increase for this district is under con-

sideration by the Wage Adjustment Board. In this connection the New London Ship & Engine Company advises us as follows:

First, that their foundry employees have requested an increase in wages of 20%, but have agreed to postpone decision on the matter until after expected action of the Wage Adjustment Board.

Second, their employees in the pattern shop have demanded an increase of 50%, which the company has declined to grant.

Third, that while their employees in the machine shops and remaining departments have not as yet filed any formal request or demand, nevertheless that there is an evident uneasiness and that the question will culminate on or before the action of the Wage Adjustment Board.

5. As the New London Ship & Engine Company's facilities are exclusively devoted to work for the Navy Department, nearly all of which is on engines and other machinery for submarines building by us, and as their work for us is on cost and percentage basis, we are vitally interested in securing some satisfactory adjustment of this matter. The prices which we are receiving for the boats will not permit us to absorb these extra costs which are due to governmental action.

6. In order to avoid a strike at the works of the New London Ship & Engine Company, or at any rate a very heavy loss of men, it is essential that we should be informed now as to what action would meet the approval of the department. We are of the opinion that nothing but confusion would result from a classification of labor at this plant in accordance with navy-yard standards, and we believe the difficulty can be adjusted by an increase in wages corresponding to the wage increase in shipyards in this district doing Government work.

7. As the situation may become acute at any moment, we would earnestly request an early decision as to the department's position and wishes in the premises.

Very respectfully,

ELECTRIC BOAT COMPANY,
L. Y. SPEAR,
Vice President.

LYS/BAM

This letter was not answered.

In the latter part of March or early in April, 1918, following the writing of this letter, Mr. Spear had an interview with Josephus Daniels, Secretary of the Navy, in which he

(Mr. Spear) detailed the situation as he saw it, told the Secretary that the plaintiff could not complete the contracts without suffering a heavy loss, and that it was questionable whether the contracts could be financed, but that the plaintiff could go ahead with the work if compensation were paid on the basis of "cost-plus." Mr. Spear further advised the Secretary that his company desired a present assurance that the anticipated advance in the wage scale would not have to be sustained by it without reimbursement. The Secretary, in reply thereto, said that the Navy Department would do what was fair and equitable and requested Mr. Spear to make a statement in writing covering the main facts about the wage increases and the labor situation and the contractual relations with the New London Company and to submit such statement for recommendation to Admiral Capps, of the Compensation Board, which board controlled matters relative to "cost-plus" contracts. The statement was prepared and submitted on April 27, 1918, in accordance with the Secretary's request.

The recommendation relative to the statement, as requested by the Secretary of the Navy, was prepared by the board, through Admiral Capps, and submitted to the Secretary April 29, 1918. It accurately restated plaintiff's contentions contained in the letter of April 27 and made its conclusions. The report and recommendation follow:

APRIL 29, 1918.

E-407-6, 407-6.
From: Compensation Board.
To: Secretary of the Navy.
Subject: Adjustment of wages to meet decision of Shipbuilding Labor Adjustment Board, so far as they affect contracts with the Electric Boat Company.
Enclosures: Two (2); (A) and (B).

1. Memorandum from Electric Boat Company dated April 27, 1918, requests the department's consideration of an increase in cost of submarines now being built under "fixed-price" contracts. These submarines are as follows:

O-3 to 10, inclusive.
AA-1 to *3*, inclusive.
R-1 to *20*, inclusive.
S-1.

The above-noted memorandum sets forth the conditions of subcontracts for the hulls and certain parts of the machinery.

Reporter's Statement of the Case

2. For the hulls building at Union Iron Works the cost to the Electric Boat Company is determined as follows:

Full cost of material to subcontractor.

Full cost of direct labor to subcontractor.

Plus 60% on direct labor for overhead expense.

Plus a minimum profit to the subcontractor of 5% on the total of the above three items.

3. For hulls building at the works of the Fore River Shipbuilding Corporation the method of determining the total cost to the subcontractor is the same as at the Union Iron Works, but the profit in this case is a minimum of 7½% of the total cost as above determined instead of 5% as at Union Iron Works.

4. The memorandum sets forth the various changes in rates of pay since the execution of these contracts, although the specific increase in cost of labor is not stated.

5. Immediate action is stated to be imperative before May 1, in order that rates of pay of labor at the New London Company may make changes in rates of pay already authorized by the Navy Department at navy yards and other shipbuilding yards and by the Emergency Fleet Corporation with respect to vessels being built for that corporation as a result of recent decisions of the Shipbuilding Labor Adjustment Board.

6. The memorandum further states that the Secretary and Assistant Secretary have already given assurance that the contractor would be reimbursed for additional costs involved in increase of labor rates at the shipyards.

7. The contractor assumes that the matter will be disposed of as a change under the contract and submits the following specific claims for reimbursement:

First. Reimbursement to the Electric Boat Company for the increased cost under its ship contracts.

Second. Reimbursement to the Electric Boat Company for the increased cost account of labor directly employed.

* * * * * * *

9. The context would seem to indicate that the Electric Boat Company under the headings indicated in the foregoing paragraph desired full reimbursement on account of the increased cost of labor directly employed by the Electric Boat Company; also full reimbursement on the basis of the original contract, of all amounts paid or to be paid to its subcontractors on account of the increase in wages recently authorized. Except that in view of its stock interest in the New London Company it only claims for the work done by that company the net increase in cost exclusive of the profit percentage paid by it to that subcontractor.

10. To meet the unusual conditions arising from recent increases in wages, it would appear that the most equitable solution of the difficulty would be along the following lines:

First. The department to authorize reimbursement to the Electric Boat Company for increased payments to subcontractors necessitated by increase in wages, subject to conditions hereinafter noted.

Second. The department to authorize reimbursement to the Electric Boat Company on account of the increased cost of labor directly employed by it and by the New London Ship & Engine Company. These increases in wages to be on a basis substantially equivalent to that authorized by the Navy Department for other shipyards and navy yards in the vicinity.

Third. That the actual adjustment of the amount of such reimbursement to the Electric Boat Company as may be allowed by the department under recommendations contained in preceding subparagraphs be determined as a change under the contract and subject to conditions noted below.

Fourth. That inasmuch as such a change under the contract would be an arrangement to meet the equities of the situation, the Electric Boat Company should submit to the department a statement outlining the original estimated cost of each class of submarine boats herein considered under these "fixed-price" contracts in such detail as to permit the department to determine the actual increased cost due to changes in rates of labor.

Fifth. That in determining the subcontractor's actual cost for building hulls of submarine boats the flat percentage of 60 per cent on direct labor for overhead provided in the original subcontract be readjusted so as to cover approximately the actual overhead expense, if such overhead expense, on the basis of the new wage scale, exceeds 60 per cent of direct labor provided for in the original subcontract and under the scale of wages in existence prior to recent wage decisions of the Shipbuilding Labor Adjustment Board. Such adjustment is necessary in order that an additional profit may not accrue to the subcontractor by reason of the unusual increase in the cost of direct labor. Consideration should also be given in this connection to the actual total profit to the subcontractor and to the Electric Boat Company.

11. With respect to the Electric Boat Company's claim for reimbursement of the actual increased cost of machinery and outfit being supplied by the New London Ship & Engine Company, the claim as adjusted, should not only *not* include an actual increased profit to the subcontractor, but it should

not include an increased profit to the Electric Boat Company by reason of including the cost of these items in the total cost of the vessels at their increased cost, so far as concerns the application of the percentage profit called for by the cost-plus contracts between the Navy Department and the company.

12. In conclusion it is recommended that such adjustment as may be authorized by the Navy Department be with the distinct understanding that neither the Electric Boat Company nor any of its subsidiaries nor any of its subcontractors should derive any additional profit whatever by reason of the Navy Department's assuming the burden of the additional cost due to increased wages; moreover, where probable profits to the Electric Boat Company and any of its subcontractors or subsidiaries under the original "fixed-price" contracts and at the original wages were in excess of 10 per cent—including bonuses where there are any such—the additional cost assumed by the Navy Department on account of increases in wages shall in no case provide a profit to the Electric Boat Company or any of its subcontractors or subsidiaries in excess of 10 per cent on the basis of the original "fixed-price" contract.

13. The accompanying memorandum from the Electric Boat Company and the letter of March 29, 1918, from the same company were handed to the senior member of the Compensation Board personally by Mr. L. Y. Spear, vice president of the company, who stated that he had been requested by the Secretary of the Navy to bring these matters to the attention of the Compensation Board with a view of their consideration and submission of a recommendation to the department in connection therewith.

W. L. CAPPS,
Chief Constructor, U. S. N., Senior Member.

The endorsement of the Secretary of the Navy thereto was as follows:

[1st endorsement]

APRIL 29, 1918.

From: Secretary of Navy.
To: Solicitor of the Navy Department.
Via: Bureaus of Construction and Repair and Steam Engineering and Compensation Board.
Subject: Adjustment of wages to meet decision of Shipbuilding Labor Adjustment Board so far as they affect contracts with the Electric Boat Company.

1. Forwarded to the solicitor via Bureaus of Construction and Repair and Steam Engineering and the Compensation Board.

2. The recommendations contained in Compensation Board's letter No. E-407-6, 407-6, of April 29, 1918, these recommendations being concurred in by the Chief of the Bureau of Construction and Repair and the Chief of the Bureau of Steam Engineering, are approved.

3. The solicitor will take the usual steps to give effect to these recommendations as a change under the contract.

4. The actual cost of these changes, based upon conditions set forth in the letter of the Compensation Board, will be determined in the usual way by the Board on Changes or the Compensation Board, in accordance with the contract provisions applicable to the various groups of vessels herein referred to.

JOSEPHUS DANIELS.

The Board on Changes mentioned in the endorsement never functioned with respect to the questions involved for the reason that no formal reference to it was made.

VII. The plaintiff secured a copy of the recommendation and endorsement on May 13, and on June 4 was officially advised of its contents. The plaintiff thereupon addressed a letter to the Secretary, in which it stated that it did not feel that a final conclusion as to the equity or practicability of the proposed arrangement could be reached without further detailed information as to the proper interpretation to be placed upon some portions of the Compensation Board's letter, and that because considerable time would be consumed in working out a complete and detailed agreement the department should immediately authorize *ad interim* or partial payments on account of items of additional cost of direct labor and approximate additional cost of indirect labor. It further requested that such payments begin with the month of May, 1918, and that the department wire the name of the proper agency for the arranging of the details arising out of the Compensation Board's recommendation.

Shortly thereafter plaintiff's vice president held a conference with the Compensation Board relative to the direction contained in paragraph "fourth" of subdivision "10" of the board's recommendation, to wit, that the plaintiff "should submit to the department a statement outlining the original estimated cost of each class of submarine boats under these

'fixed-price' contracts in such detail as to permit the department to determine the actual increased cost due to changes in rates of labor." The board was at that time advised by the plaintiff's vice president of the fact that plaintiff had no data from which it might obtain such a statement, inasmuch as the original estimates made and filed had no separate items of material, labor, and overhead, but had merely set forth as flat sums the expenses of turning out each and every one of the various classified parts of the submarines.

The next step in the chronology of major official actions is a joint endorsement dated June 20, 1918, by the Chief of Bureau of Construction and Repair and the Chief of Bureau of Steam Engineering of the recommendations made by the compensation boards under date of April 29 and the Secretary's endorsement, also of that date. It follows:

[Joint first endorsement]

WASHINGTON, D. C., *June 20, 1918.*

From: Chiefs of Bureaus.
To: Navy Department.
Via: Compensation Board.
Subject: Adjustment of increased cost on account of raising wages on final price of submarine building by Elecertic Boat Co. (Elec. Bt. Co.'s let. of 6/7/18 to Sec. of the Navy).

1. Returned.

2. In its 1st endorsement dated May 31, 1918 (Apr. 29, 1918), the department approved the recommendations of the Compensation Board as contained in its letter dated April 29, 1918, #E-407-6, 407-6, which in the 10th paragraph (fourth) recommended that the Electric Boat Company should submit certain statements to the department showing the original estimated cost of each class of submarine boats under fixed-price contracts, etc. As far as the bureaus are aware, no such statements have been furnished by the Electric Boat Company.

3. As the preparation of these statements will doubtless take some time, the bureaus recommend that the department authorize the adjudication by the Boards on Changes of the increase of cost due to *direct* labor, pending other adjustments as indicated by the Compensation Board's letter above referred to. The boards on changes on hull and machinery can act jointly on the change on each vessel, but

the data to be compiled by cost inspectors for the information of the boards in adjudicating the changes can be made where the data are most available.

(Signed) TAYLOR.
(Signed) GRIFFIN.

To this was appended a second and third endorsement, as follows:

[2nd endorsement]

JUNE 22, 1918.

File No. E–407–6, 407–6.
From: Compensation Board.
To: Navy Department.
Subject: Adjustment of increased cost on account of raising wages on final price of submarine building by Electric Boat Company.

1. In its letter of April 29, 1918, No. E–407–6, 407–6, to the Secretary of the Navy the Compensation Board made certain recommendations to treat this matter as a change under the contract. These recommendations were concurred in by the Chiefs of Bureaus of Construction and Repair and Steam Engineering, and approved by the department.

2. The recommendations of the Compensation Board were subject to certain general and specific conditions which were outlined in paragraphs 10, 11, and 12 of the Compensation Board's above-noted letter of April 29, 1918. Among the specific recommendations, especial attention is invited to the following:

[Here was quoted from the Compensation Board's letter of recommendation paragraphs 10, *fourth and fifth*, 11 and 12.]

3. It will be noted from the above that certain definite data should be submitted by the Electric Boat Company. Some of the most important of this data ought to be on record in the office of the Electric Boat Company, and its transmission at this time ought to involve no difficulty.

4. The specific request made by the Electric Boat Company contained in paragraph 2 of its letter of June 7, 1918, hereto attached, is based upon the assumption that the Navy Department will assume the total additional cost of direct labor and indirect labor, due to recent increase in wages, quite regardless of the original profit to the Electric Boat Company, by reason of its original "fixed-price" contract and the profit therein contained on the basis of wages then prevailing. The granting of such a request is entirely contrary to the explicit conditions contained in the Compensation Board's letter of April 29, 1918.

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5. It is therefore believed that prior to any additional action whatever by the Navy Department the Electric Boat Company should immediately forward its original estimates as to cost of these vessels, based upon cost of labor and material at the time the estimates were prepared, with such additional data as may be available concerning changes in cost of labor and material since the original estimate was made.

6. Subject to the above comment, the Compensation Board concurs in the recommendations contained in the joint first endorsement hereon of the Bureaus of Construction and Repair and Steam Engineering.

(Signed) W. L. CAPPS,
Chief Constructor, U. S. N., Senior Member.

[3d endorsement]

28470-42:61
S/W/Bm
NAVY DEPARTMENT,
July 24, 1918.

From: Secretary.
To: Compensation Board.
Subject: Adjustment of increased cost on account of raising wages on final price of submarines building by Electric Boat Company.

The board will advise the Electric Boat Company as recommended in paragraphs 3 to 5 of its second endorsement.

(Signed) JOSEPHUS DANIELS.

The plaintiff was advised of the above August 2, 1918. Meanwhile, that is, on June 22, 1918, the plaintiff had again communicated with the Secretary relative to the requirement of subparagraph *Fourth* of paragraph 10 calling attention to the lack of response to its letter of June 7, and stating that in its opinion it would be impracticable to arrive at the actual increased cost by any method based on the original cost estimates, and suggesting that the adjustment be based upon the actual costs as shown by the books.

On July 31, 1918, in response to what the plaintiff deemed to be the desires of the Compensation Board, as expressed at its conference with the members thereof, the plaintiff submitted a detailed report of increased costs, both known and as to future work estimated, based on the scale of wages

prevailing prior to the first increase responsive to Government action.

On August 21 and again on August 27 the Compensation Board, by P. L. Reed and David Potter, respectively, advised the Navy cost inspector located at the plaintiff's plant as to the procedure relative to the ascertainment of the amount of increased wages, called attention to the fact that the original estimates of labor costs (hours and rates) had not been supplied by the plaintiff, and requested that the cost inspector bring these and other matters spoken of in the letter to the attention of the plaintiff.

Likewise on the latter date (August 27) the Secretary wrote the New London Ship & Engine Company (in response to plaintiff's request for a confirmation of its understanding that it would be reimbursed for additional costs involved in a wage increase recommended by the Secretary, July 25), as follows:

S/W/HTL.
NAVY DEPARTMENT,
Washington, August 27, 1918.

GENTLEMEN: The department has received your various telegrams with regard to the classification of your employees and the allowance of increased compensation due to the advance in wages under the decisions of the Shipbuilding Labor Adjustment Board.

Under date of April 29, 1918, the department directed that the Electric Boat Company should be reimbursed on account of the increased cost of labor directly employed by it and by the New London Ship & Engine Company. The amount of such reimbursement, however, did not necessarily equal the amount of increase in wages due to the adjustment board's decision but rather to the difference between the enhanced labor cost and such allowances for increase in labor expense as had been estimated for by the Electric Boat Company at the time the contracts were signed.

There are, therefore, two questions involved, the first being the amount of compensation to be paid the men, and the second, how much of the increase in this compensation shall be paid by the department. The first question is in no way dependent upon the second, for while the department fully realized the cost of labor increases it is not informed as to whether those increases were not anticipated by the Electric Boat Company from the beginning.

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It is for this reason that the order of April 29 required a showing from the Electric Boat Company which would enable the department to determine what action it should equitably take. It was not until about the 20th of the present month that any attempt was made to comply with this requirement, and when figures were finally submitted to the Compensation Board they were found to be incomplete and insufficient for the purposes intended. The accountants of the Compensation Board have gone fully into the matter with a representative of the Electric Boat Company and are advising that company of exactly what is lacking to enable the department to reach a conclusion.

In the meantime neither the Electric Boat Company nor its subsidiaries will be performing their contracts if they allow a suspension of work due to their unwillingness to meet wage increases in such a manner as to insure the active prosecution of the work. The department will deal equitably with its contractors, but can not be expected to authorize increased compensation unless the information which it needs is promptly and willingly given and given in full.

(Signed) JOSEPHUS DANIELS,
Secretary.

NEW LONDON SHIP & ENGINE COMPANY,
New London, Connecticut.

In answer to the requests contained in these letters, plaintiff, on September 18, 1918, wrote to the Compensation Board and advised that, as it had previously explained orally, it was unable to supply the information requested, since no original estimates in the form desired were ever made. This letter enclosed a supplement to the report given by plaintiff July 31 theretofore and called attention to the fact that it was finding financial embarrassment in the payment of the increased costs.

The Compensation Board, by letter of October 2, 1918, to the Secretary, after reviewing the general situation, wrote as follows:

"The Compensation Board is not prepared at the present time, without further study, to recommend final allowances for increased labor costs. It believes, however, that some financial relief should be given to the Electric Boat Company, as the company has presumably been paying the increased wage costs for several months, and, according to the information submitted in the estimates, will suffer very material loss when the contracts are completed.

* * * * * * *

"The Compensation Board therefore recommends, in order to give financial relief to the Electric Boat Company, that an allowance of $700,000 (which is approximately 50% of the increased direct labor cost, as shown on enclosure 'A') be authorized at this time. As the Compensation Board has no direct knowledge as to the various payment clauses incorporated in the contracts for these vessels, it is not recommending the basis of apportioning this recommended $700,000 to the various groups of vessels. The submarines under discussion being on fixed-price contracts, the proportion of this amount applying to each group which can be considered as having been earned and payable to the company for completed work would seem to be most logically allocable by the Bureau of Construction and Repair and Bureau of Steam Engineering and their representatives.

"The adoption of the above recommendation will give the necessary *temporary* relief to the shipbuilder. In order to arrive at a proper *final* settlement of the matter it will be necessary to examine in great detail the books of the contractors in connection with all their expenditures on these vessels. As there are thirty-two of these vessels with contracts varying in numerous particulars, this work would involve a considerable increase of the accounting force of the Compensation Board, which force is at present merely adequate to take care of the board's regular work on cost-plus contracts. For this reason the Compensation Board believes that this work could be more advantageously done by the Bureau of Supplies and Accounts, which is understood to have a large force for such work; and the board therefore recommends that the Bureau of Supplies and Accounts be instructed to check the actual cost of these fixed-price vessels and then, jointly with the Bureaus of Construction and Repair and Steam Engineering, to make appropriate recommendation to the Navy Department as to any additional amounts to be paid.

"(Signed) A. E. STAHL,
"*For the Compensation Board.*"

On October 19, 1918, the Chiefs of Bureaus of Construction and Repair and Steam Engineering made the following joint first endorsement:

* * * * * * *

"After consideration of the papers, the bureaus concur in the recommendation of the Compensation Board in paragraph 10 of its letter herewith that the department make an *ad interim* payment to the Electric Boat Company of $700,000 upon the giving of satisfactory security, such pay-

ment to be deducted from the amounts payable on the adjudication of the changes by the 'Board on Changes' on the vessels and approval by the department."

On October 24, 1918, Mr. Roosevelt, as Acting Secretary, made the following endorsement:

"The department approves the recommendation of the Compensation Board, concurred in by the bureaus, in the papers herewith that a payment of seven hundred thousand dollars ($700,000) be made to the Electric Boat Company on account of increased direct labor cost, which sum is approximately fifty per cent of such cost, such payment to be offset against and deducted from the amounts payable on the adjudication of the changes by the board on changes on the vessels and approval by the department.

"The contractor has been required to furnish satisfactory security on account of said payment on account, and the Bureau of Supplies and Accounts will be given appropriate instructions in the premises by the department."

The result of the above recommendation was the issuance on October 30, 1918, of a public bill in the sum of $700,000, which bill recited the following:

"For *ad interim* payment on account of increased direct labor cost, the same being approximately 50 per cent of such cost and to be offset against and deducted from the amounts payable on the adjudication of the changes by the 'board on changes' on the vessels mentioned and approved by the department."

The plaintiff thereupon deposited with the defendant U. S. Liberty bonds of the face value of $700,000 as security for the $700,000 to be paid as recommended by Admiral Capps, and received a check in like amount on October 31, 1918. These bonds are still in the possession of the defendant. Interest thereon has been paid to the plaintiff as it has accrued. This sum was paid from the naval emergency fund.

VIII. New wage scales being imminent, the plaintiff on October 31, 1918, sent the following telegram to the Secretary of the Navy:

"We have received from the wage-adjustment board new wage schedules to be made effective as of October first. It is our understanding that the department desires these

schedules to be applied to the forces working on all submarines and machinery therefor at the plants of the Bethlehem Shipbuilding Corporation and the New London Ship & Engine Company. It is also our understanding that the department will pay the increased cost to us on all submarines and machinery and parts therefor building by us at fixed prices. Telegraphic confirmation of the department's wishes and intentions is requested."

On November 13, 1918, it received the following reply:

"Your additional costs in applying the new Macy scale will be met under the same conditions and in the same manner as provided for the increase of last April, as set forth in the department's order of April twenty-ninth."

And on December 4, 1918, a letter of the Acting Secretary, in which he stated:

"As you were advised by telegraph on November 13, you will be compensated for this increase in the same manner and under the same conditions as provided in the department's order of April 29 last; that is to say, as a change under the contract. You are therefore requested to submit to the department a statement of your claim on the same basis as under the April increase."

All of the wage increases, from whatever official source promulgated, were put into effect by the plaintiff and its subcontractors.

IX. On January 18, 1919, the plaintiff in a letter to the Secretary of the Navy reviewed the situation at great length and stated that it did not desire to insist upon any particular method of determining and paying the amounts in *excess* of the ordinary contract proceeds, but asked for reimbursement. A request similar in substance was made by the plaintiff to the Compensation Board on March 18, 1919.

During all of this period plaintiff's assistants and the defendant's cost inspectors, acting under occasional advice of the Compensation Board, were engaged in compiling such financial statements as in their opinion would be valuable in making a final determination of the amounts, if any, which were to be paid to the plaintiff. The plaintiff, however, was unable to obtain from the defendant any further sums, nor was it able to obtain a statement as to the exact

method to be pursued in arriving at the compensation, if any, to be paid, and as a result of this situation the plaintiff on April 15, 1919, by letter to the Secretary, reiterated its previous requests for certain payments and advanced a proposal to abandon the then structure of the contracts and to substitute therefor an equitable form of cost-plus contract.

This letter was shortly thereafter followed by a conference between the plaintiff's vice president; Franklin D. Roosevelt, then Acting Secretary; Admiral Capps, of the Compensation Board; the Solicitor of the Navy Department, and the Acting Chiefs of the Bureaus of Construction and Repair and Engineering. The Secretary, Mr. Daniels, and Admirals Griffin and Taylor, chiefs of these bureaus, were in Europe at the time. At that conference the plaintiff presented the situation, complained of the alleged dilatoriness of the Navy Department, and stated that it could go no further with the matter unless effective steps were taken promptly to put a cost-plus agreement into effect in the form of a supplemental contract. Mr. Roosevelt at the close of the conference stated that he agreed with the proposition and would put it into effect, subject to the department's legal right to do so, which was to be determined by the Comptroller of the Treasury. Mr. Roosevelt thereupon delegated Admiral Capps and the Solicitor of the Navy Department to ascertain the views of the comptroller on the propriety of the department entering into a formal supplemental agreement. Two days later, a statement having been had from the comptroller that the matter could not, in his opinion, be treated as a change under the original contract, but that a supplemental contract would be proper (except that great care was to be exercised as to the profit to be allowed), the parties met again, and Mr. Roosevelt asked the vice president if it would be satisfactory to the plaintiff to enter into a supplemental contract providing for the payment of the complete costs with deferred consideration as to profit. The vice president stated that such an agreement would be satisfactory. Thereupon, in response to the written communication and as a result of the conference, Mr.

Roosevelt, on April 29, 1919, addressed the following letter to the plaintiff:

"Replying to your letter of the 15th instant, the department has taken up with the Comptroller of the Treasury the question of increased compensation upon your fixed-price contracts, and as a result is prepared to consider a supplemental contract on each of the fixed-price contracts whereby the department will bear the actual cost of each of the vessels, the question of profit being left for future consideration. The question of actual cost will be ascertained and determined by the department after complete examination of your records and accounts and report thereon by department's inspectors."

The compensation board thereafter issued general instructions to the cost inspection boards to audit and supervise the expenditures made in connection with the submarines in question following June 1, 1919.

X. Following the letter of April 29, 1919, a draft of the proposed contract was prepared by the Solicitor of the Navy and sent to Admiral Capps for comment. The body of the agreement as proposed by the draft is as follows:

"That, in consideration of the premises and in consideration of the payments to be made as hereinafter provided, the said parties hereby covenant and agree to and with each other that the said vessels shall be constructed as expeditiously as practicable and that the above-mentioned contracts are hereby so altered, modified, and changed as to provide, and this agreement does hereby provide, that the department will pay the said contractor the actual cost of the construction of each of said vessels named in the above-described contracts. The actual cost of each of said vessels is to be ascertained and determined by the department after a complete examination of the contractor's record and accounts and a report thereon by the department's inspectors. The question as to whether the contractor shall or shall not receive a profit on the costs to be paid hereunder is not a subject of stipulation or agreement in any sense under this contract.

"2. The contractor further covenants and agrees and hereby does agree to relinquish all rights, claims, and demands, whatsoever which he now has or may hereafter acquire to any premiums or bonuses which he now claims or may hereafter claim to be due him, in addition to the contract price stated in each contract, for each day by which

said completion anticipates the date on which said vessel is due for completion under the contracts.

"3. All provisions of all clauses of the original contracts not at variance, in contradiction, or inconsistent herewith shall remain in full force and virtue."

On May 27, 1919, Admiral Capps directed a letter to the Secretary of the Navy stating that inasmuch as its extra costs would probably be handled by supplemental contracts, he recommended that future consideration of the plaintiff's problem be made by the Bureaus of Construction and Repair and Steam Engineering, as they had facilities therefor not possessed by the compensation board.

In accordance with the recommendation contained in Admiral Capps' letter of May 27, 1919, the above draft was immediately referred by the Solicitor of the Navy to the Bureaus of Construction and Repair and Steam Engineering, and on June 11, 1919, these bureaus returned the file with a joint indorsement in which was set forth what was felt to be a lack of definiteness as to what elements were to make up "costs," as contemplated in the submitted drafts, asked certain questions, and suggested that when the questions raised were answered a redraft of the proposed contract be made for consideration of the department.

The said draft, together with the recommendations, additions, and suggestions of Admiral Capps and the two bureaus, was thereupon forwarded to the plaintiff for its information.

By letter of August 1, 1919, to the Secretary of the Navy, the plaintiff made answer to the questions raised in Admiral Capps' letter of May 27, 1919, and the bureaus' indorsement of June 11, 1919, and submitted another draft of supplemental agreement, which was referred by the Solicitor of the Navy to the bureaus, to which draft, by indorsement of September 9, 1919, the bureaus made objections for various assigned reasons.

For several months thereafter no definte action seems to have been taken by the parties, and at no time has a formally executed supplemental contract been entered into.

XI. By letter of April 8, 1920, to the Secretary of the Navy, the plaintiff requested the department to secure such

additional appropriations as might be necessary to discharge plaintiff's claims, and further to appoint a board of naval officers for the purpose of investigating any claims submitted by the plaintiff for reimbursement on account of expenditures made in the effort to earn premiums for early delivery, and that this board be further authorized and directed to investigate and report on all of plaintiff's other claims in respect to the submarines in question.

By precept of May 13, 1920, amended June 30, 1920, the Acting Secretary of the Navy created a board composed of five naval officers, which board later became known as the "Baxter board." It was directed to ascertain, estimate, and determine the actual cost and the damage, if any, caused to the plaintiff, and further to consider and report on the plaintiff's claims under the following headings:

Claim I. Damages due to delays caused by changes.

Claim II. Extra expenditures in effort to earn premiums for early delivery.

Claim III. Wage increases.

Claim IV. Extra costs due to premature launching of submarines *R-15* to *R-20*.

Claim V. Extra police protection.

Claim VI. Retroactive wages.

To this board the plaintiff made its claims in the following amounts under the above headings:

Claim I	$290, 994. 03
Claim II	2, 069, 900. 00
Claim III	4, 449, 456. 83
Claim IV	277, 526. 52
Claim V	24, 723. 50
Claim VI	276, 036. 78
Total	7, 388, 637. 66

The board made an exhaustive examination of plaintiff's books and records up to August 30, 1920, considered all of the claims mentioned above, and set down provisionally the amounts which it considered the "actual cost and damage" as contemplated by the first direction of the precept. These amounts were as follows:

Claim I	$134, 782. 51
Claim II	1, 909, 600. 00
Claim III	2, 670, 703. 70
Claim IV	209, 767. 92
Claim V	14, 371. 77
Claim VI	245, 575. 95
	5, 184, 801. 85

The precept had also directed the board to make a report to the Secretary of the Navy as to what increased compensation should be allowed the contractor, and after setting forth the above provisional figures it reported that provisional amount I should not be allowed; provisional amount II should be allowed in full; provisional amount III should be allowed not more than fifty (50%) per centum; provisional amount IV should be allowed in full; provisional amount V should be allowed in full; and that provisional amount VI should be allowed not more than fifty (50%) per centum.

For the purpose of the recommendation it consolidated these figures, and on February 17, 1921, reported that a sum of $3,392,023.50 "would be adequate and would constitute a full, fair, and equitable settlement of the six claims covered in the department's precepts to the board."

After deducting the amount of $700,000 previously referred to, the net amount recommended to be paid became $2,692,023.50.

In response to an order of the Navy Department, the Baxter board reconvened April 18, 1921, for the purpose of reconsidering Claim II to which objection had been made by the department and the Bureaus of Construction and Repair and Steam Engineering. The board reaffirmed its previous conclusion, stated that its recommendation of the original amount had been based on a general consideration of all the claims as consolidated, but reported, however, that if Claim II were to stand alone the sum of $1,864,231.03 was recommended to be allowed therefor.

XII. By order of April 13, 1921, the Secretary of the Navy directed Captain Beuret to form a board on changes, consisting of certain named officers, pursuant to the provisions of the fourth clause of the contracts. This board was

directed to examine into and report on the costs due to premature launching of the *R-15* to *R-20* boats.

On June 4, 1921, the board made its report, in which it determined that the contractors were entitled on this item to the sum of $141,302.34. This amount was on June 17, 1921, paid to the plaintiff and accepted by it.

XIII. By two precepts dated June 21, 1922, of the Navy Department the report of the Baxter board was disapproved, a new board of five naval officers (known as the "Taylor board") was created and directed to consider and report on plaintiff's Claims I, II, III, V, and VI.

The board was further directed to report what compensation should be allowed the plaintiff, and on September 13, 1922, it made the following recommendations on the items above:

Claim I	$16,400
Claim II	895,800
Claim III	2,325,000
(This includes $700,000. See Finding VII.)	
Claim V	14,352
Claim VI	168,000

It twice reconvened, and in its last report added $93,750 to the amount of $2,325,000 previously set forth in Claim III.

The plaintiff, by letter of September 29, 1922, made certain criticisms of the Taylor board's findings relative to wage increases and retroactive wages, and by letter of December 2, 1922, asserted that the board's findings as to cost of police protection were acceptable; the board's deduction of $42,321.23 from the cost of increased wages (being subcontractors' profit) was acceptable; and that the board's deduction of $22,634.76 from the cost of retroactive wages (being the subcontractors' profit) was acceptable; but that all other deductions were not.

Plaintiff also made special objection to the board's method of arriving at the figure under Claim II, which objection was upheld by the Judge Advocate General, and the same board (but at that time headed by Admiral Carpenter) met, reconsidered Claim II, and on May 11, 1923, recommended that the sum of $1,325,500 be allowed therefor. The depart-

ment had already recognized this claim by payments while refusing to make payments on the other claims. It had on April 13, 1921, made a payment under the claim of $800,000; on June 18, 1921, a payment of $250,000; and the final report of the board was followed on July 25, 1923, by the final amount of $275,500, making up the total of $1,325,500.

Again, by letter of May 19, 1923, the plaintiff made definite statement that it would not consider a settlement on the basis of the conclusions reached by the Taylor board's report, which, in plaintiff's opinion, was short of the Government's minimum legal liability. In reply the Secretary advised the plaintiff by letter of November 16, 1923, that the department denied legal liability and did not consider that it had authority to make any payment under the first precept (i. e., increased wages, police protection, retroactive wages) without supporting legislation, and therefore did not deem it appropriate to express a conclusion relative to the report at that time.

XIV. Costs to the plaintiff as well as the proceeds received by it based on the method of accounting used by the Baxter board are indicated by the following tabulation, introduced in evidence in substantially the same form as amended, Exhibit F.

(1) Submarine	(2) Extra cost of police	(3) Extra cost of retroactive wages	(4) Extra cost of Government wage increase	(5) Total of columns 2, 3, and 4
AA-1	$1,789.98	$10,822.80	$147,391.10	$160,003.88
AA-2	1,403.06	12,264.70	352,455.26	366,123.02
AA-3	1,403.06	12,264.70	352,455.25	366,123.01
O-3	399.60	3,579.43	19,284.53	23,263.56
O-4	399.60	3,579.43	19,284.52	23,263.55
O-5	399.60	3,579.43	19,284.52	23,263.55
O-6	399.59	3,579.43	19,284.52	23,263.54
O-7	399.59	3,579.43	19,284.52	23,263.54
O-8	399.59	3,579.42	19,284.52	23,263.53
O-9	399.59	3,579.42	19,284.52	23,263.53
O-10	399.59	3,579.42	19,284.52	23,263.53
R-1	288.38	6,734.15	128,338.18	135,360.71
R-2	288.38	6,734.15	128,338.18	135,360.71
R-3	288.38	6,734.15	128,338.18	135,360.71
R-4	288.38	6,734.15	128,338.18	135,360.71
R-5	288.38	6,734.15	128,388.18	135,360.71
R-6	288.38	6,734.15	128,338.18	135,360.71
R-7	288.38	6,734.15	128,338.18	135,360.71
R-8	288.38	6,734.15	128,338.18	135,360.71

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(1) Submarine	(2) Extra cost of police	(3) Extra cost of retroactive wages	(4) Extra cost of Government wage increase	(5) Total of columns 2, 3, and 4
R-9	$288.38	$6,734.14	$128,338.18	$135,360.70
R-10	288.38	6,734.14	128,338,18	135,360.70
R-11	288.38	6,734.14	128,338.18	135,360.70
R-12	288.39	6,734.14	128,338.18	135,360.71
R-13	288.39	6,734.14	128,338.18	135,360.71
R-14	288.39	6,734.14	128,338.18	135,360.71
R-15	304.51	7,915.72	84,065.84	92,286.07
R-16	304.51	7,915.72	84,065.83	92,286.06
R-17	304.51	7,915.72	84,065.83	92,286.06
R-18	304.51	7,915.72	84,065.83	92,286.06
R-19	304.51	7,915.71	84,065.83	92,286.05
R-20	304.52	7,915.71	84,065.83	92,286.06
S-1	694.73	17,498.83	238,414.57	256,608.13

Submarine	(6) Costs exclusive of column 5	(7) Total costs column 5 plus column 6	(8) Original contract proceeds, including expedition premium on R-1/20	(9) Profit (+) or loss (−) difference between column 7 and column 8
AA-1	$2,164,374.28	$2,324,378.16	$1,379,349.46	−$945,028.70
AA-2	1,956,241.94	2,322,364.96	1,490,515.26	−831,849.70
AA-3	1,956,241.95	2,322,364.96	1,497,187.43	−825,177.53
O-3	628,423.05	651,686.61	583,451.31	−68,235.30
O-4	628,423.06	651,686.61	581,628.01	−70,058.60
O-5	628,423.06	651,686.61	581,701.73	−69,984.88
O-6	628,423.07	651,686.61	583,582.57	−68,104.04
O-7	628,423.07	651,686.61	583,708.50	−67,978.11
O-8	628,423.08	651,686.61	583,280.61	−68,406.00
O-9	628,423.08	651,686.61	583,020.38	−68,666.23
O-10	628,423.07	651,686.60	584,546.53	−67,140.07
R-1	810,932.02	946,292.73	852,499.11	−93,793.62
R-2	810,932.02	946,292.73	844,754.47	−101,538.26
R-3	810,932.02	946,292.73	833,547.32	−112,745.41
R-4	810,932.02	946,292.73	832,761.05	−113,531.68
R-5	810,932.02	946,292.73	829,702.99	−116,589.74
R-6	810,932.02	946,292.73	834,018.41	−112,274.32
R-7	810,932.02	946,292.73	822,861.82	−123,430.91
R-8	810,932.02	946,292.73	821,617.54	−124,675.19
R-9	810,932.02	946,292.72	821,812.62	−124,480.10
R-10	810,932.02	946,292.72	812,677.22	−133,615.50
R-11	810,932.02	946,292.72	812,540.88	−133,751.84
R-12	810,932.01	946,292.72	812,800.22	−133,492.50
R-13	810,932.01	946,292.72	812,589.09	−133,703.63
R-14	810,932.01	946,292.72	812,399.45	−133,893.27
R-15	767,424.31	859,710.38	886,073.24	+26,362.86
R-16	767,424.32	859,710.38	886,212.45	+26,502.07
R-17	767,424.31	859,710.37	886,121.46	+26,411.09
R-18	767,424.31	859,710.37	886,192.97	+26,482.60
R-19	767,424.32	859,710.37	886,553.35	+26,842.98
R-20	767,424.31	859,710.37	886,486.93	+26,776.56
S-1	1,558,597.45	1,815,205.58	1,224,904.85	−590,300.73

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SUMMARY

Submarine	Extra cost of police protection, retroactive wages, and Government wage increases	Other costs	Total costs	Total returns	Losses
AA-1	$160,003.88	$2,164,374.28	$2,324,378.16	$1,379,349.46	$945,028.70
AA-2/3	732,246.03	3,912,483.89	4,644,729.92	2,987,702.69	1,657,027.23
O-3/10	186,108.33	5,027,384.54	5,213,492.87	4,664,919.64	548,573.23
R-1/14	1,895,049.91	11,353,048.25	13,248,098.16	11,556,582.19	1,691,515.97
	2,973,408.15	22,457,290.96	25,430,699.11	20,588,553.98	4,842,145.13
S-1	256,608.13	(Other extra costs and profits have been waived)			256,608.13
R-15/20	553,716.36	(Other extra costs absorbed in expedition premiums)			553,716.36
	3,783,732.64				5,652,469.62
Advancement					700,000.00
Balance					4,952,469.62

The plaintiff's audit and report, made by its own expert and in accord with its own methods of accountancy, disclosed an actual loss, due to all increases occasioned both by increase in wages and delay, of $6,940,396.68. No claim, however, is made for this amount.

XV. The figures listed under column 6 of said tabulation include in themselves the costs to the plaintiff of the various changes ordered from time to time, which costs are different from those determined by the board on changes. It is not possible to learn from the plaintiff's books what the amount of money is which represents the difference between the payments made as a result of the recommendations of the board on changes and the actual cost of the change as claimed by the plaintiff and included in said column 6.

The plaintiff suffered penalties for delay in delivery amounting to $139,610, and this amount is, therefore, not included as part of the proceeds in the figures contained in column 8.

Likewise deductions were suffered by the plaintiff for "incomplete or unsatisfactory work" not physically made good by it. This amounted to $40,327.82. This amount is, therefore, not included as part of the proceeds contained in column 8.

Added costs to the plaintiff for making good "incomplete or unsatisfactory work" after delivery to the defendant

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amounted to $59,496.81, and this figure is included in column 7 as part of the total costs.

As heretofore in Finding III set forth, the sum of $500 was retained by the defendant from the contract price for the vessels *O-3* to *O-10* until final settlement and release was effected. These sums are not sued for in this action and form no portion of the amounts set forth in the above tabulation.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff is a New Jersey corporation. In the years 1915, 1916, and 1917 plaintiff entered into 32 separate contracts with the defendant to construct and deliver 32 submarine torpedo boats. The total original consideration for the entire undertaking was $23,806,000.00. Under the contracts the vessels were to be delivered at stated times, and express provision was made reserving to the defendant the right to make changes in plans and specifications. Changes were made and the vessels were not delivered upon the contract dates. Time for completion of the vesesels was duly extended by the Government, and they were accepted without the imposition of deductions as meeting requirements under this stipulation. This case is due exclusively to the interposition of war conditions, and the amounts claimed as losses are predicated upon alleged contracts of reimbursement for such losses, recognized by and due wholly to acts of the Government whereby the cost of completing the contracts was greatly enhanced. The facts, not particularly involved but somewhat extensive, are as follows: The President on March 22, 1917, issued a proclamation suspending the provisions of the eight-hour law in Government contracts and thereby established a new standard for labor, resulting in the authorization of overtime work and wages. This was immediately prior to our entrance into the war. Subsequent to this latter event the Navy Department adopted the policy of constructing destroyers and giving this form of construction precedence over all other construction work. The plaintiff had sublet to the Fore River Shipbuild-

ing Company and the Union Iron Works certain construction work under its Government contracts for submarines, and the Government had made eighty-five contracts with the above-named corporations for the immediate construction of destroyers. We need not advert in detail to contemporaneous labor conditions and the strenuous effort to procure immediate augmentation of naval vessels. As a matter of fact, the necessity for the program which followed April, 1917, was in a large measure anticipated prior to that date. The plaintiff beyond doubt was faced with a condition in nowise contemplated when its fixed-price contracts for submarines were entered into. The Navy Department recognized the existing state of affairs and with commendable expedition set up the Shipbuilding Labor Adjustment Board. This board was the result of agreements dated August 20, 1917, and December 8, 1917, between the Secretary of the Navy, the chairman of the United States Shipping Board, the general manager of the Emergency Fleet Corporation, and officers and representatives of several of the labor unions involved. Within the purview of the board's jurisdiction under the agreement were the vital and important subjects of the adjustment of labor disputes concerning wages, working hours, and working conditions in shipyards having contracts for the construction or repair of vessels for the Emergency Fleet Corporation and the Navy Department. On November 4, 1917, the board established a minimum wage scale for the Pacific coast, retroactive to September 22, 1917—a wage scale affecting the Union Iron Works Company, plaintiff's subcontractor—and from time to time thereafter issued decisions affecting the general wage scale. The plaintiff, while not a party to the above agreement, put into effect the board's decisions respecting wages and working conditions. When bonuses were paid by other contractors the plaintiff adopted the same policy, and without exception the plaintiff observed the decisions of the board and paid wages accordingly.

On March 29, 1918, the plaintiff in writing brought to the attention of the Secretary of the Navy the seriousness of the situation respecting the increase in cost and financial

loss involved in the continuance of its subcontractors' work under their contracts with the plaintiff, and expressly pointed out that both the Union Iron Works, of San Francisco, California, and the Fore River Shipbuilding Company, as well as the plaintiff's own subsidiary, the New London Ship & Engine Company, of Groton, Connecticut, were faced with increased cost of construction which the fixed price of its contracts could not absorb. This letter was never answered. It was followed by a personal interview between the vice president of the plaintiff company and the Secretary of the Navy. The result of the interview is admittedly found in the reference of the matter to Admiral Capps, in control of matters respecting cost-plus contracts, the plaintiff's vice president seeking a change of contractual relationship as to compensation to be paid for the work from fixed-price contracts to a cost-plus basis. The Secretary of the Navy assured the plaintiff's vice president that the plaintiff would be dealt with on a fair and equitable basis. Admiral Capps, as senior member of the Compensation Board, transmitted to the Secretary of the Navy his report and recommendations covering the subject matter of the reference on April 29, 1918. This recommendation concretely stated in five precise paragraphs may, we think, be epitomized as follows:

The department, to meet the unusual situation on an equitable basis, should authorize reimbursement to both the prime contractor and its subcontractor on a basis substantially equivalent to the increase in wages authorized for other shipyards in the vicinity; that the adjustment should be determined under the stipulation in the contracts authorizing changes therein, after the plaintiff had submitted its original estimate of actual cost under its fixed-price contracts in such detail as to enable the department to accurately determine the increased costs. Overhead expense was to be so adjusted under changed conditions as to preclude allowance of profits, and in no event to include profits in excess of 10%, including bonuses on the basis of the plaintiff's fixed-price contracts.

On April 29, 1918, the same day the Capps report was received, the Secretary of the Navy indorsed thereon a ref-

erence of the same to the solicitor of the department, via the "Bureaus of Construction and Repair and Steam Engineering and Compensation Board," in which the secretary expressly stated that the cost of the changes involved would be determined by either the Board of Changes or the Compensation Board, in accord with the applicable contract provisions of the various contracts. Plaintiff received a copy of the above recommendations on May 13, 1918, and on June 4, 1918, was officially advised of the action taken. Immediately thereafter another letter was addressed to the secretary by the plaintiff, pointing out the necessity for interpreting certain provisions in the report, and soliciting from the secretary authorization for *ad interim* payments on account of the additional cost of both direct and indirect labor, emphasizing the importance of the latter allowance because of the obvious delay in reaching final adjustments in detail. Later on the above letter was supplemented by a personal interview with the secretary, in which the plaintiff stated its inability to submit estimates of the original cost of the vessels under its contracts, due to the fact that its original bids were lump-sum bids submitted without segregation of this item, and therefore had no available data from which it might be obtained. Without going into detail as to the numerous references and indorsements thereon, it seems adequate for the purposes of the case to state that the real controversy revolved around the single issue of arriving at a just and demonstrable allowance predicated upon the difference between the estimated cost of the vessels under the plaintiff's contracts and the increased cost ascribable to the Labor Adjustment Board's increase of wages, etc. The Secretary of the Navy summed up the position of the department in his letter of August 27, 1918. After stating that the department had previously directed reimbursement, express reference was made to the fact that two questions were alone involved. "First, the amount of compensation to be paid the men, and, second, how much of the increase in this compensation shall be paid by the department. The first question is in no way dependent upon the second, for while the department fully realized the cost of labor increases it is not informed as to whether

those increases were not anticipated by the Electric Boat Company from the beginning." Therefore, it is apparent that the single factor forestalling conclusive action existed in the inability of the plaintiff to furnish the estimated cost of the vessels at the time it submitted its bids. The Secretary in closing the above communication admonished the contractors that failure to perform their contracts would be charged if the company suspended operations or exhibited an unwillingness to put the increased wage scale into effect. Subsequently on September 18, 1918, the plaintiff in a letter to the Compensation Board, reiterated its inability to supply accurate data as to its estimate of original cost of the vessels, supplemented its earlier report to the board made July 31, and called especial attention to impending financial embarrassment due to increased cost of construction. The board expressed an unwillingness to recommend complete reimbursement for losses already incurred, but did, however, recognize the plaintiff's present financial condition, and recommended the immediate payment to the plaintiff of $700,000.00 stating the board's belief that the sum suggested approximated 50% of the increased direct labor cost and would serve to tide the plaintiff over temporarily, closing the recommendation with a statement that further allowance should be determined by an examination of plaintiff's books of account by the Bureau of Supplies and Accounts under the supervision of the Bureau of Construction and Repair and the Bureau of Steam Engineering, to which bureaus the whole matter should be referred. In October, 1918, the above bureaus approved the Compensation Board's recommendations, advised the payment of $700,000.00 to the plaintiff upon the giving of proper security therefor, and thereafter, on October 31, 1918, with the express approval of the Acting Secretary of the Navy, the $700,000.00 was paid the plaintiff in accord with the bureaus' terms and conditions.

On October 31, 1918, the Labor Adjustment Board notified the plaintiff as to new wage schedules to become effective October 1, 1918, and plaintiff again, at its request, received written assurances that it would receive reimbursement for the additional costs to be incurred in performing its con-

tracts on the basis of changes in its contract provisions. The new wage schedule did go into effect and the plaintiff conformed thereto. No further payments as to this particular matter were made to the plaintiff. During the greater portion, if not during all this period, the plaintiff's assistants and the defendant's cost inspectors, acting under occasional advice from the Compensation Board, were engaged in examining plaintiff's books of account and compiling therefrom a statement as to the amount which would ultimately and finally be sufficient to reimburse the plaintiff for the increases it had been forced to incur. Manifestly this was a task of magnitude and importance, involving not only expert accountancy but tedious length of time. In January, March, and April, 1919, the plaintiff by letter put before the Secretary of the Navy its then status with respect to the contracts involved and its present financial needs, expressed an indifference as to the method of reimbursement if it reflected the true extent of the loss, and closed with a suggestion of an additional advancement and the abandonment of the existing contracts, a new contract to be entered into for the completion of the vessels on a cost-plus basis. Plaintiff's new proposition, i. e., a new cost-plus contract, was considered in a conference composed of plaintiff's vice president; the Acting Secretary of the Navy; Admiral Capps; the Solicitor of the Navy Department, and the acting chiefs of the Bureaus of Construction and Repair and Steam Engineering. The plaintiff positively stated to the assembled conference that the company had reached the point where it could not go forward with the construction of the vessels without relief in the form of a cost-plus contract. The conferees assented to the change, and decided upon its adoption, if in the opinion of the Comptroller of the Treasury such a change could be legally effected. The Comptroller of the Treasury in his opinion advised the Solicitor of the Navy Department that the proposed relief could not be afforded as a change under the contract, but could be accomplished by a supplemental contract. Thereafter the Acting Secretary of the Navy approved the alteration of the plaintiff's contractual relationship with the de-

partment, stated his willingness to consider a supplemental contract so drawn as to impose the cost of increases due to increased wages, etc., upon the Government, and left open for future determination the rate of profit to be paid the plaintiff. Such a contract was, on April 29, 1919, drafted by the solicitor of the department, referred to the official and bureaus designated in Finding X and subsequently altered and redrafted and finally after several months for some undisclosed reason was never signed by either party.

In April, 1920, the plaintiff appealed to the Secretary of the Navy for the appointment of a naval board to consider its claims for reimbursement. In May, 1920, the Secretary of the Navy created the Baxter Board, a board composed of five naval officers, and to it committed the consideration of plaintiff's claims. This board made a finding recommending a total allowance to the plaintiff of $3,392,023.50, from which was to be deducted the $700,000.00 previously advanced, leaving as due the plaintiff $2,692,023.50. On April 13, 1921, a board on changes, created by the Secretary of the Navy, reported an allowance due the plaintiff for changes of $141,302.34 instead of $134,782.51 allowed by the Baxter Board. The findings of the Baxter Board were disapproved by the Navy Department, and on June 21, 1922, the Taylor Board came into existence. The Taylor Board report is found in Finding XIII. The controversy culminated on November 16, 1923, by the Navy Department denying legal liability to make any reimbursements, predicating its opinion upon the absence of authority so to do without supporting legislation, and hence the plaintiff received no payments except the $700,000.00 heretofore mentioned, and for the recovery of which the defendant interposes a counterclaim.

The final petition of the plaintiff prays for a judgment of $5,020,712.70 and "such rate of profit as the court may deem just and equitable." The right of recovery under this phase of the litigation is rested upon the proof of an alleged cost-plus contract as recited in detail in Findings IX and X. Doubt as to a preliminary oral agreement between the parties respecting the making of a cost-plus contract to take the place of plaintiff's existing fixed-price contracts is removed by the record. An agreement embodying the matter

was drafted, the Comptroller of the Treasury had advised as to its legality, and why it was not executed does not appear. If the plaintiff's contention as to the liability of the Government was solely dependent upon this state of the record, it would be invulnerable. It is true that the interested parties designated the agreement as a supplemental contract. However, the designation was but an expression. The transaction, it seems to us, in all its phases involved not a supplemental contract but an entirely new and original undertaking, i. e., a complete substitution both in form and substance for the terms and conditions appearing in plaintiff's original contracts. The consideration for the performance of the plaintiff's original undertakings was fixed definitely in each of its thirty-two contracts. To radically change the method of payment and reward the plaintiff upon a basis so decidedly distinct as cost, plus a profit, involves, it seems to us, much more than the mere supplementing of the original stipulations by an agreement or agreements recognizing incidental troubles and expenses growing out of the performance of the contracts, which by their very nature could be paid and leave undisturbed the original contracts and the undertakings thereunder. In the one case it is an agreement to make good an unforeseen loss; in the other, a new contract embracing new contractual relationships. It is in our judgment a vastly different thing to agree to assume liability for increases in costs due to the necessities of the Government in a time of emergency, which might, if not assumed, ruin a contractor, and to completely change the terms and conditions of an existing contract and enter into another of a separate and distinct type to replace the former. The record signally emphasizes what we mean. In 1919, four years after the first contracts and two years after the last, an oral agreement is proposed by which the Government is to retroactively assume cost prices for all the construction work performed by the contractor and add thereto a fixed profit as a substitution for obligations, definitely fixing in stated sums the amounts the Government was to pay, which included the contractor's cost of performance and profits. In the contracts as they existed the risk was voluntarily assumed by the contractor. In the

proposed substitution it is transferred by entirely new obligations to the Government. This we think is at variance with a proposition supplemental in its nature to simply reimburse the contractor for actual losses sustained, due to unforeseen events not within the control or contemplation of the parties when the contract was made and of such nature as to warrant and furnish consideration for the Government's action by way of securing prompt delivery of the vessels and avoiding labor troubles, inescapable under the prevailing conditions. In the first case, as to a cost-plus contract, section 3744, Revised Statutes, applies and the contract must be in writing; in the other we think the case of *E. W. Bliss Co.* v. *United States*, 61 C. Cls. 777, reversed by the Supreme Court November 29, 1927, is apropos.

The defendant insists that the record does not sustain a supplemental contract to reimburse the plaintiff for increases in cost of construction due to increased wage scales; that the advanced scale of wages promulgated from time to time by the Labor Adjustment Board and overtime wages fixed were voluntarily paid by the plaintiff without express order or the slightest compulsion upon the part of the Government. Aside from the positive facts negativing the above contention, we think the record unmistakably warrants the inference that the element of voluntary assent to the changed conditions is distinctly lacking. The contractor could, if so disposed in time of war, have stood upon his contract rights, and the Government might have done likewise. The statement needs no demonstration. We are not concerned with what the parties might have done; the case is the outgrowth of what was done. To assert that a contractor confronted with an acute paucity of labor in a position to demand increased wages and overtime working hours voluntarily meets the demands when he is without recourse to do otherwise, and thereby absorb all his contemplated profits and perhaps encounter financial embarrassment in addition, is to take away from the word "voluntary" that freedom of choice the word imports. This record discloses the fact that the plaintiff had available under the existing conditions and the terms of its contracts a

choice between two methods of procedure, one to patriotically acquiesce in the Labor Adjustment Board's decision and proceed with the performance of its contracts; or remain adamant and face a strike of its employees, which would have excused performance. The Government realized the situation and met it with promptness and positiveness.

Counsel for the defendant from a very able and careful analysis of the record deduces a conclusion that the proven facts at best establish an agreement upon the part of the Government officers to do no more than *consider* the plaintiff's claim, and that an agreement to *consider* claims creates the single obligation to fix the mind thereon, examine into, and at some future time render a definite conclusion, and in this case no final conclusion was reached; in other words, consideration was all that obtained. The subject matter before the Secretary of the Navy and other responsible officers of the department was a contention for an agreement to pay the plaintiff for excess cost of production, due to the increased wage scale. It involved serious consideration, first as to the legal right to grant the request, and, secondly, the extent of the liability to be assumed. The expressed intent of the Secretary indicated at the initiation of the controversy was to do justice and equity, and the subsequent proceedings as the court finds from the record resulted in an agreement, as the result of consideration, to reimburse the plaintiff when a legal way should be found to do so. The single disturbing factor to a consummated written understanding was what route to take; not that all routes should be closed. If, then, the Secretary was in accord with the claim presented by the contractor, and consented to his claim, the fact that he misconceived his legal authority in the premises does not remove from the negotiations the important element of mutuality. We think the record is replete with facts which clearly demonstrate a condition wherein had the Secretary had before him the decision of the Supreme Court in the *Bliss case* this litigation would not have followed. To consider, as usually employed in legal proceedings, conveys the meaning of consideration and adjudication. The Secretary was not, we think, using the

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word "consider" in a restricted sense. It was the established policy of the defendant to recognize the existence of the manifest equities of contractors situated as the plaintiff was, and the record sustains a conclusion that those in authority were in agreement with an obligation to pay, and that all that was left to be done was to find the lawful way in which it could be accomplished. If an authorized official of the Government receives a contention for the allowance of claimed rights, and assents to consider it, and by a series of acts thereafter, indicating careful investigation of the claim in all its details, reports that the claim is just and should be allowed, it is difficult to perceive the absence of an agreement upon the merits of the controversy on the single basis that failure to carry out the award is due to a misapprehension of lawful authority to proceed to payment. The various steps taken in relation to plaintiff's claim, the voluminous correspondence, the repeated investigations of the books of the company, and numbers of reports made, in not one of which appears a dissent to the justice of its allowance, bring, we think, the parties into such a relationship that the court is without authority to do aught else except to find the existence of a contract, such as is relied upon by the plaintiff, to pay the loss suffered.

We have no difficulty, in view of the findings, in holding that a supplemental agreement to reimburse the plaintiff for its increased costs of production, due to the waiver of the eight-hour law by the Government and the wage increases established by the Labor Adjustment Board, with the approval and assent of the Government obtained. From the beginning of the long controversy to its finality there exists but one positive statement that in anywise negatives the Government's complete assent to reimburse the plaintiff, and that one statement made in 1923, five years after the close of hostilities, in the face of an express opinion from the Comptroller of the Treasury previously given that an agreement might be legally consummated to care for the situation, is rested not upon a denial of the existence of such a contract, but wholly upon a question of legal liability to make the reimbursements.

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We have set forth an extensive and tedious summary of the facts; it is useless to recite the numerous written documents passing between the plaintiff and the defendant with reference to reimbursement. Suffice it to say that the letter of the Secretary of the Navy, dated August 27, 1918 (Finding VII), recites: "Under date of April 29, 1918, the department directed that the Electric Boat Company should be reimbursed on account of the increased cost of labor directly employed by it and by the New London Ship & Engine Company." Thereafter $700,000.00 was paid to the plaintiff. Again, in Finding VIII, appears a positive statement that additional costs due to the "new Macy scale" will be met under the same conditions as appear in the defendant's order of April 29. These two excerpts, standing apart from the unbroken continuity of express promises to reimburse, are sufficient to sustain the plaintiff's contention. The one misgiving, the single prevailing doubt in the mind of the Navy Department, was as to the legal method to be adopted whereby the supplemental contract might be made effective. If, then, the minds of the parties met and the supposed legal impediment may be removed, do we not have beyond peradventure a consummated agreement? The *Bliss case, supra,* we think, furnishes the answer. The Supreme Court said in the *Bliss case:* "The court is of opinion that the Secretary of the Navy had authority to make further contracts to pay the petitioner the increased costs resulting from the wage increases put into effect at the Secretary's instance, in the course of the petitioner's performance of the original contracts, and that the findings of the Court of Claims show that such further contracts were made and were based upon an adequate consideration, consisting of both advantage to the Government and detriment to the petitioner." The *Bliss case* discloses no more convincing state of facts than this case, and the proceedings in this case and the *Bliss case* were contemporaneous. See also *Savage Arms Corporation* v. *United States,* 266 U. S. 217; *Russell Motor Car Co.* v. *United States,* 261 U. S. 514; *United States* v. *Swift & Co.,* 270 U. S. 124; *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75.

It is hardly essential to continue the discussion on this branch of the case. We think the facts establish a true supplemental contract, i. e., one emanating from and directly traceable to difficulties inherent in the performance of the plaintiff's obligations under the original contracts, due directly to governmental emergencies and imposed upon the contractor at the instance of the Navy Department, as appears, in Finding VII, from the Secretary's letter of August 27, 1918.

In the course of the Navy Department's efforts to check the books of accounts of the plaintiff the Baxter Board adopted a method of ascertaining increased cost. The report of the Baxter Board (Finding XI) reflects its efforts and discloses that it is the result of an exhaustive examination of plaintiff's books and records up to August 30, 1920, asserting in addition that the report reflects "actual cost and damage" as per directions contained in the precepts. The Taylor Board (Finding XIII), in its report, materially reduced the findings of the Baxter Board. The Taylor Board succeeded the Baxter Board following the disapproval by the department of the Baxter Board's report. The plaintiff assented to the correctness of three findings of the Taylor Board, but declined to accept the remaining ones. The Judge Advocate General sustained plaintiff's objection to one finding. The final conclusion of the effort to satisfactorily reach an amount terminated in the plaintiff's refusal as above mentioned, and the defendant's determination of an entire absence of legal liability for any of the increases. The single available source of evidence to establish the amount of the increases, aside from Government records of the rates of increases, was the plaintiff's books of account. Of course, difficulties were to be encountered in ascertaining with indisputable exactness, to the very penny, the amounts expended by the plaintiff in meeting the increases. Thirty-two contracts, representing a consideration of almost twenty-four million dollars, were involved, and it is not to be expected, nor is it required under the law, that the bill of damages shall measure up to a greater degree of certainty than is required in cases of this nature. Transactions like this ex-

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tending over a long period of years, involving extensive and detailed accounting, lend themselves to expert accountancy, and if the court is convinced that the evidence offered is sufficiently certain to sustain the expenditure at least of the amounts proven, we think the plaintiff entitled to a judgment therefor. *Daughetee* v. *Ohio Oil Co.*, 263 Ill. 518; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540. The precept creating the Baxter Board contained specific directions as to subject matter of investigation and items of increase. Six factors involving allowances were enumerated. They appear in the second paragraph of Finding XI. The plaintiff, employing its own method of audit, ascertains a sum much in excess of the Baxter Board totals. The court, in reconciling the testimony, giving effect to plaintiff's willingness to accept the Baxter Board's method of investigation and computation, has reached the conclusion that the supplemental contract established extended only to reimbursement for the increases due to extra cost of labor under the scale of wages put in force by the Labor Adjustment Board. In so doing we accept the plaintiff's proof in this regard as sufficiently certain to establish the payment of the amounts claimed for extra cost of police, extra cost of retroactive wages, and extra cost of the Government wage increase, a total of $3,783,732.64, less $700,000.00 advanced, leaving a balance of $3,083,732.64 due the plaintiff. The amounts relied upon are taken from the plaintiff's books, are much less than the plaintiff's audit discloses, and represent in dollars and cents what the books show as extra costs incurred.

We think the settled rule as to damages is that they are not to be denied because they may not be susceptible to indisputable accuracy. The test to be applied is: Have the sums claimed been calculated upon a reasonable basis, and under all the circumstances of the case does the claimed amount reflect the proximate injury? If the element of speculation is absent, if the basis of computation is the usual and customary one followed in cases of a similar character, and the court is satisfied that the method of computation employed reflects with reasonable certainty the extent of the loss, judgment may be predicated upon this

basis. Especially is this true where the loss was occasioned by some act of the defendant. *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 273 U. S. 359, 378. Recurring to the fact that the original contracts in this case were peace-time agreements; that construction work had proceeded thereunder, both under the contractor and subcontractor; that the volume of work and the extent of accounting were immense, there is little room for doubt that a result reached by the audit of plaintiff's accounts by a method of accounting adopted by disinterested parties possesses far more probative effect than were it otherwise. The defendant, if we correctly apprehend the contention, does not challenge the existence of a loss, if the contract to reimburse is established. It is the method which is attacked. An analysis of the computation, it is claimed, discloses the fact that within the totals relied upon there are buried amounts foreign to the item of extra cost of labor, and which are cared for by the terms of the original contracts, i. e., certain sums for which claim could only be asserted under the method the original contracts set up, such as changes made in the original drawings, plans, etc., wherein the contracts provide an exclusive way for extra or diminished cost, and to the same effect the extra costs due to premature launching of the vessels, etc, etc. If the facts upon which the defendant relies exist the contention is invulnerable, for it is clear that past settlements in accord with the contracts are closed incidents, and inasmuch as they comprehended extra or diminished costs of construction, the boards provided for in the contracts possessed conclusive authority to finally determine the issue (*United States* v. *Gleason*, 175 U. S. 588; *Moran Bros. Co.*, 61 C. Cls. 73), and may not now be included in the ascertainment of damages. The difficulty in the way of according weight to this particular defense lies in the fact that the judgment to be awarded in this case is not predicated upon a cost-plus basis, but is limited to the increased wage scale the plaintiff put into effect and for which the defendant agreed to reimburse the plaintiff, a supplemental agreement by the terms of which the Government assumed the expense of increased wages and addi-

tional cost due to what the Government required of the contractor. So that we are alone concerned with this single item and not the cost of the vessels. If the evidence offered reflects what the plaintiff was paying in wages prior to the inauguration of the increased scale and what followed thereafter, with reasonable accuracy we think the computation sufficiently certain to exclude the element of conjecture and speculation. It will be noted that column 6 of the tabulation set out in Finding XIV is a detailed computation of the great number of changes ordered under the original contracts from time to time, and Finding XV recites the inability of the court to accept it as accurate. This fact, supplemented by the court's conclusion that the right of recovery is limited to the sums stated in columns 2, 3, and 4, we think conclusively removes from the case the apprehended danger on the part of the defendant of duplication of costs and payments.

"Where the originals consist of numerous documents which can not be conveniently examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any person who has examined the documents and who is skilled in such matters, provided the result is capable of being ascertained by calculation. This has been permitted when another course would cause great loss of time and tend to confuse the jury; and competent witnesses have been allowed to summarize the accounts and to state conclusions as to balance, solvency or insolvency, and the like. *Of course, the court may require the production of the originals if this is deemed necessary.*" (Jones on Evidence, civil cases, p. 254.)

The proof offered is in our opinion the best evidence of the loss available, and establishes with certainty the extent of the same. The judgment awarded is not the judgment sought in the petition, plaintiff contending for the amount of increases plus a reasonable profit. The court, however, is authorized under our forms of pleading to award a judgment in accord with the facts stated and proven, notwithstanding the absence of a count in the pleadings for the particular recovery. *Wood et al.* v. *United States*, 49 C. Cls. 119; *Clark* v. *United States*, 95 U. S. 539.

Syllabus

The defendant in the brief raises an issue of jurisdiction. The contention is predicated upon the act of March 4, 1925, 43 Stat. 1273. We think the *Bliss case*, *supra*, disposes of the argument. In any event, the statute relied upon afforded no exclusive relief and, unlike the case of *United States* v. *Babcock*, 250 U. S. 328, created no exclusive forum.

The defendant's counterclaim will be dismissed. Judgment for the plaintiff for $3,083,732.64. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

ATLANTIC COAST LINE RAILROAD CO., A CORPORATION, v. THE UNITED STATES

[No. E-592. Decided December 3, 1928]

On the Proofs

Insurance tax; railroad "relief department"; death benefits.—A voluntary unincorporated association of railroad employees, conducted under the auspices of the company, without profit, to provide themselves with necessary hospital and medical treatment and disability and death benefits, towards which each member contributes a stipulated amount, according to class, is subject to the life insurance tax imposed by section 503 of the revenue act of 1918, on its certificates of membership, and does not come within the exemptions of section 231 of said act.

Same; contract of insurance; premiums.—Where under contracts with its employees a railroad company agrees, in return for premiums paid in cash or by assignment of wages, to pay their beneficiaries certain sums of money in the event of death, the contracts are ones of insurance, and as such subject to the Federal insurance tax.

Same; insurance without profit.—The revenue act of 1918 taxing the issuance of policies of insurance, is not applicable solely to the issuance of policies by those engaged in the business for profit.

Statutory construction; elimination of exempting clause before passage of act; consideration of prior statutes.—The elimination of a specific provision as first reported to a branch of the legislature, which, if enacted, would exempt certain associations from taxation, is very persuasive as indicating an in-

tention on the part of Congress that they are not to be exempt, and in interpreting the act as passed the court may consider all prior statutes.

The Reporter's statement of the case:

Mr. M. C. Elliott for the plaintiff. *Mr. Carl H. Davis* was on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, during the calendar years 1920 and 1921 and for some time prior to April, 1899, was and now is a common carrier by railroad in interstate commerce operating railroads or lines of transportation in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama.

II. In April, 1899, there was organized and has since been maintained a certain voluntary association of the nature of a mutual benefit association, known as the "Relief department of the Atlantic Coast Line Railroad Company," which was operated and conducted during said calendar years 1920 and 1921 in accordance with regulations duly promulgated and governing the business of said "relief department." There is attached to the petition filed herein, and marked Exhibit "A," a true and correct copy of said regulations of said "relief department," which is made a part of these findings by reference. Each and every paragraph and provision thereof was in full force and effect during said calendar years 1920 and 1921.

III. Annual reports to the members of the "relief fund" of said "relief department" were duly published, correctly setting forth its operations and activities for the years ending December 31, 1920, and December 31, 1921, true and correct copies of which are attached to these findings as Exhibits "B" and "C," respectively.

IV. Said annual reports of said "relief department" for the years 1920 and 1921, Exhibits "B" and "C," respectively, show among the members of said "relief department" certain "death benefit only contributors," numbering

403 as of December 31, 1920, and 420 as of December 31, 1921, these members having been former employees of plaintiff, retaining their membership in said "relief department" as to death benefits only in accordance with the provisions of paragraph 27 of the revised regulations of said "relief department."

V. The plaintiff at its own expense has erected hospital buildings for the treatment of members of and which are operated by the "relief department." The "relief department" received as revenue or income from its hospitals for the treatment of nonmembers the following sums: For the year ending December 31, 1920, $7,560.79; for the year ending December 31, 1921, $6,365.59, which revenue or income was received under the following circumstances: Hospital treatment is provided by the hospitals to employees of plaintiff company who are not members of the "relief department" as well as to those who are members of that department. The "relief department" charges plaintiff company for all hospital service rendered company's employees who are not members of the "relief department" at a rate based upon the yearly operating expenses of the hospital, which rate is designed merely to cover the actual cost of such service. The amounts so collected pass to the credit of the relief fund under the head of "collections for the treatment of nonmembers."

VI. The taxes, interest, and penalties, sought to be recovered in this action covered the period from March, 1920, to December, 1921, inclusive. Said taxes, interest, and penalties amounted to the sum of $2,542.37, consisting of premium taxes in the sum of $1,860.00 on the issuance of "certificates of membership" to members of said "relief department," together with interest and penalties thereon in the sum of $682.37, and were levied and assessed by the Commissioner of Internal Revenue under the provisions of section 503 of the revenue act of 1918 against the *Atlantic Coast Line Railroad Relief Department*. Plaintiff company paid said sum of $2,542.37 to the collector of internal revenue under written protest on April 7, 1924. Thereafter plaintiff duly filed claim for refund of said sum of $2,542.37, which was rejected by said Commissioner of Internal Rev-

enue on or about August 20, 1925, and no part of said sum has been repaid to said plaintiff.

VII. The Atlantic Coast Line Railroad Company relief department is a voluntary unincorporated association, the object and purpose of which were, and are, the establishment and management of a fund known as the "relief fund" for the payment of definite amounts to members contributing thereto when, under regulations governing said relief department, they are entitled to such payment by reason of accident or sickness, and, in the event of their death, to their relatives or other beneficiaries designated in accordance with said regulations.

VIII. During the years 1920 and 1921 membership in the relief department and participation in the relief fund were based upon application by the proposed member in the form prescribed by the regulations, acceptance of said application by the superintendent of said relief department, and a certificate of membership issued by him to the applicant.

The prescribed form of application contains (1) an agreement to be bound by the regulations in force or thereafter adopted; (2) an assignment by the applicant in advance of such portion of his wages to the plaintiff in trust for the relief fund, as is provided in, and according to the rate prescribed by the regulations for persons of the same class who are members of the relief fund; (3) the designation of the person or persons to whom the death benefit is payable; (4) the disposition to be made of the death benefit in case the member died leaving no next of kin within the permitted class of beneficiaries, and authorization that funeral or other expenses paid by the superintendent of the relief department shall be first deducted from death benefits otherwise payable; (5) an agreement that the application when approved shall not be avoided by any change in the character of the applicant's service or locality where rendered; that any change in the amounts to be contributed to the relief fund which the applicant may thereafter consent to shall be appropriated from his wages, and that the agreement covering the appropriation from his wages of his monthly contributions to the relief fund shall constitute an assignment in advance to plaintiff in trust for the purposes of the

relief fund, which assignment shall have precedence over any other assignment by the applicant of his wages, or of any claim upon his wages on account of liabilities incurred by him; (6) an agreement that upon the applicant being transferred to the service of any other company associated with plaintiff in the joint operation of their relief departments, such transfer should operate to transfer the applicant's membership from said relief fund of plaintiff to the relief fund of such other company; (7) an agreement by the applicant for himself and those claiming through him to be bound by the regulations providing for final and conclusive settlement of disputes by reference to the superintendent of the relief department, and an appeal from his decision to the advisory committee; (8) the applicant's certificate that he is correct and temperate in his habits; that he is unaware of the existence of any injury or disease, constitutional or otherwise, except as shown on his statement to the medical examiner constituting a part of his application, and that he is in good health; (9) and an agreement by the applicant that any untrue or fraudulent statement made by him to the medical examiner, or any concealment of the facts in the application, or any attempt on his part to defraud or impose upon said relief fund, or his resignation from or leaving the service of said company, or being relieved or discharged therefrom, shall forfeit his membership in said relief fund and all benefits, rights, and equities arising therefrom, except such as may have arisen by reason of disability beginning and reported before, and continuing without interruption to and after such termination of his employment, and except as to the applicant's right to continue his membership with respect to death benefit only, as provided in said regulations.

The certificate of membership in the relief fund, issued by the superintendent of the relief department upon the acceptance of plaintiff's application, is in terms as follows:

ATLANTIC COAST LINE RAILROAD COMPANY RELIEF DEPARTMENT

Certificate of Membership in the Relief Fund No. ———

This Certifies, That ——— ———, employed by the Atlantic Coast Line Railroad Company, is a member of the

Relief Fund of the Relief Department of the Atlantic Coast Line Railroad Company, and is entitled to the benefits provided by the regulations of the Relief Department for a member of the ——— Class with ——— Additional Death Benefit of the First Class.

——— ———,
Superintendent of the Relief Department.

OFFICE OF THE SUPERINTENDENT,
Wilmington, N. C., ——— ———, *192—.*

IX. Members of the relief fund were classified according to the amount of their regular pay per month, as follows:

Monthly pay	Highest class
Less than $35.00	1st
$35.00 or more, but less than $55.00	2nd
$55.00 or more, but less than $75.00	3rd
$75.00 or more, but less than $95.00	4th
$95.00 or more	5th

X. Any employee of plaintiff not over forty-five years of age, upon passing a satisfactory physical examination, may, upon approval of his application by the superintendent of said relief department, become a member in the highest class allowed by his pay, with or without additional death benefits of the first class not greater in the aggregate than three times the death benefit of the class he enters, and any member not over forty-five years of age, subject to a satisfactory physical examination and the approval of his application therefor by said superintendent, may change to any higher class allowed by his pay, or take additional death benefits of the first class to such extent that the aggregate of additional death benefits shall not exceed three times the death benefit of the class in which he is or becomes a member.

XI. A person's membership in the relief fund of said relief department ceases and determines when his monthly payments are in arrears for two months, or when he resigns from or leaves plaintiff's service without notice or is relieved or discharged therefrom, except that a member who is furloughed, suspended, or otherwise relieved from plaintiff's service for a period not exceeding thirty days may retain his membership during such absence by payment of the necessary amount in advance to continue his membership, and except that any member who has been continually in plain-

tiff's service for three years and a member of the relief fund for one year immediately preceding termination of his employment may, upon application made prior thereto or within five days thereof, retain his membership for the minimum death benefit only held by him during the last year of his employment by payment quarterly in advance in cash of the necessary amount to cover death benefits only.

XII. During the calendar years 1920 and 1921 the number of plaintiff's employees and the number of members of said relief fund, not including death benefits only contributors, were as follows:

Employees and membership

(Compiled December 31, 1920)

	No. of employees	No. of members
Transportation department employees (trainmen and yardmen)	3, 168	2, 757
Motive power department employees (enginemen and firemen)	1, 833	1, 662
Shopmen	7, 062	3, 036
Roadway department employees	5, 570	773
Station, telegraph, general office, and all other employees	6, 710	2, 530
Total	24, 343	10, 758

Per cent of employees members, 44.19.

(Compiled December 31, 1921)

	No. of employees	No. of members
Transportation department employees (trainmen and yardmen)	2, 571	2, 315
Motive power department employees (enginemen and firemen)	1, 755	1, 492
Shopmen	5, 303	3, 254
Roadway department employees	5, 330	883
Station, telegraph, general office, and all other employees	6, 321	2, 769
Total	21, 280	10, 713

Per cent of employees members, 50.34.

XIII. The relief fund from which benefits are paid consists of contributions from the members thereof, income or profit derived from investment of the moneys of the relief fund, interest at the rate of 4% per annum paid by plaintiff on monthly balances of said relief fund held by it, advances by plaintiff when necessary to pay benefits as they become due, for which advances plaintiff reimburses itself if and when the contributions of members with

interest and other income are sufficient therefor, and income derived from the treatment of nonmembers in relief department hospitals.

XIV. The regulations of the relief department provide that the word "contribution" shall be held and construed to refer to such designated portion of the wages paid by plaintiff to an employee as he shall have agreed in his application that plaintiff shall apply for the purpose of securing the benefits of the relief fund, or to such cash payment as it may be necessary for a member to make for said purpose.

Contributions for full membership are made monthly in advance at the following rates:

First class	$0.75 per month.
Second class	1.50 per month.
Third class	2.25 per month.
Fourth class	3.00 per month.
Fifth class	3.75 per month.

Contributions for death benefits only are paid quarterly in advance at the following rates, to wit:

"(1) For all 'death benefits only' in effect prior to September 1st, 1917, thirty cents, monthly, for each death benefit of the first class.

"(2) For all 'death benefits only' applied for and put into effect on and after September 1st, 1917, forty-five cents, monthly, for each additional death benefit of the first class, in excess of the death benefits held by such members on September 1st, 1917.

"(3) 'Death benefits only' applied for by persons who become members after September 1st, 1917, forty-five cents, monthly, for each death benefit of the first class."

XV. Plaintiff's total receipts and disbursements for the calendar years 1920 and 1921 were as follows:

Receipts for the year 1920

Net contributions of members	$201,443.81	
Collections for treatment of nonmembers	7,560.79	
Received from Atlantic Coast Line Railroad	60,467.05	
Interest paid by the railroad company on monthly balances	1,132.60	
Total		$270,604.25

Reporter's Statement of the Case

Disbursements for the year 1920

Death benefits—accidents	$14, 500. 00	
Death benefits—sickness	68, 831. 50	
Disability benefits—accidents	26, 479. 50	
Disability benefits—sickness	52, 256. 50	
Surgical attendance	13, 164. 35	
Maintenance of department hospitals	51, 717. 05	
Hospital bills—account Federal administration	1, 993. 75	
Total		$228, 942. 65
Cash balance in hands of treasurer December 31, 1920		41, 661. 60

Receipts for the year 1921

Net contributions of members	$214, 554. 07	
Collections for treatment of nonmembers	6, 365. 59	
Received from Atlantic Coast Line Railroad	2, 516. 43	
Interest paid by railroad company on monthly balances	1, 517. 69	
Insurance on South Rocky Mount Hospital equipment	2, 383. 82	
		$227, 337. 60
Balance to credit of fund December, 1920		41, 661. 60
Total		268, 999. 20

Disbursements for the year 1921

Death benefits—accident	$14, 700. 00	
Death benefits—sickness	74, 126. 67	
Disability benefits—accident	20, 762. 20	
Disability benefits—sickness	50, 911. 50	
Surgical attendance	11, 805. 24	
Maintenance of department hospitals	47, 697. 35	
Hospital bills—account Federal administration	200. 00	
Total		$220, 202. 96
Cash balance in hands of treasurer December 31, 1921		48, 796. 24

XVI. Members are entitled upon the conditions prescribed in said regulations to the following benefits:

First. Payment for each day of disability classes as due to accident for a period not longer than fifty-two weeks as

follows: To a member of the first class, 50 cents; second class, $1.00; third class, $1.50; fourth class, $2.00; fifth class, $2.50, and at half these rates thereafter during the continuance of disability.

Second. Payment for each day, except for the first six days, of disability classed as due to sickness, for a period not longer than fifty-two weeks, at the same rates as for accident benefits; and provision by the department for free medical treatment of the member, in one of the hospitals under its control, in cases of disability, classed as due to sickness which, in the opinion of the medical examiners of the department, may require such treatment, and when approved by the superintendent or chief surgeon.

Third. Payment, in accordance with the conditions prescribed in the regulations, upon the death of a member, as follows: To the beneficiary of a member of the first class, $250; second class, $500; third class, $750; fourth class, $1,000; fifth class, $1,250. Also payment of $250 for each additional death benefit of the first class to which the beneficiary is entitled.

XVII. The relief department is in the executive charge of a superintendent whose directions in carrying out its regulations are to be complied with, subject to the control of plaintiff's president and advisory committee.

XVIII. The advisory committee consists of plaintiff's general manager, ex officio a member and chairman, and twelve other members, six chosen annually by plaintiff's board of directors and six chosen annually by ballot by the members of the relief fund, and said regulations provide that said advisory committee shall have general supervision of the operations of said relief department and see that they are conducted in accordance with said regulations, with power to recommend the investment, and any changes therein, of money belonging to said relief department which is not required for immediate use, and to audit the accounts of said relief fund annually.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

SINNOTT, *Judge*, delivered the opinion of the court:

The plaintiff, the Atlantic Coast Line Railroad Company, seeks to recover the sum of $2,642.37, with interest thereon from April 14, 1924, which sum plaintiff claims was illegally collected from it by the Commissioner of Internal Revenue, under authority of section 503 of the revenue act of 1918, 40 Stat. 1104, as taxes on policies of insurance claimed by the commissioner to have been issued by plaintiff.

During all the time herein involved plaintiff was a common carrier by railroad in interstate commerce, operating railroads or lines of transportation in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama. In April, 1899, there was organized, and has since been maintained, under the general auspices of the plaintiff, a certain voluntary association, composed of the employees of plaintiff, known as the "Relief department of the Atlantic Coast Line Railroad Company."

Plaintiff alleges in its petition: "The primary object of this association was to create a trust fund out of which the members contributing thereto and becoming the beneficial owners thereof might be paid certain sums in case of sickness or disability on account of personal injury, and out of which trust fund, in the case of the death of any member, certain sums might be paid to the beneficiary or next of kin designated by such member."

Employees of the company were permitted voluntarily to become members of the relief fund by filing an application with the superintendent of the department and passing a satisfactory physical examination. When this application was approved by the superintendent there was issued a certificate to the employee, of which the following is a copy:

"ATLANTIC COAST LINE RAILROAD COMPANY RELIEF DEPARTMENT

"*Certificates of Membership in the Relief Fund*

"This certifies that ——— ———, employed by the Atlantic Coast Line Railroad Company, is a member of the Relief Fund of the Relief Department of the Atlantic Coast Line Railroad Company and is entitled to the benefits pro-

vided by the regulations of the Relief Department for a member of the ——— class with ——— additional death benefits of the first class."

There are five classes of members, the classification being based upon the regular or usual monthly pay received by the employee.

On the death of a member of the relief fund, payments were made to the beneficiary in varying amounts from $250 to $1,250, according to the member's classification. In order to become a member the employee agreed to pay, by assignment in advance, into the trust fund of the relief department of the Atlantic Coast Line Railroad Company a certain portion of his wages.

A member who had been continuously in plaintiff's service for three years and a member of the relief fund for one year immediately preceding the termination of his employment could retain his membership for the minimum death benefit only held by him during the last year of his employment by payment, quarterly in advance, in cash, of the necessary amount to cover death benefits only.

Out of something over 20,000 employees of plaintiff there were about 10,000 members of said relief fund. About 400 former employees retained their membership in said relief department as to death benefits. The regulations covering said relief fund provided that an advisory committee shall have general supervision of the operation of said relief department. The advisory committee consisted of plaintiff's general manager, ex officio a member and chairman, and twelve other members, six chosen annually by plaintiff's board of directors and six chosen annually by ballot by members of the relief fund.

Plaintiff alleges in its complaint:

"6. Your petitioner as an incident of its business as a common carrier, in order to afford the care and protection to its employees for which such association was organized, undertakes on behalf of the beneficial owners of such fund—

"(a) To collect and hold in trust the contributions or subscriptions made by the members thereof;

"(b) To pay all expenses of administering the fund so held, including salaries of officers and employees of the relief department; and

"(c) Guarantee to the members or beneficial owners of such fund that it shall be sufficient to provide the necessary hospital and medical treatment and, in the case of the disability of any member, to pay to him the sum to which he thereby becomes entitled, or, in the case of his death, to pay to his beneficiaries or next of kin the amount to which they thereby become entitled.

"7. For the service thus rendered to the employees who are members of such association in administering said fund, for the guarantee set forth in paragraph 6 of this petition, and for the payment of advances made thereunder, your petitioner receives no monetary consideration, but treats all such sums paid for salaries or for other administrative expenses of said fund, and all sums that it is called upon from time to time to pay into said fund to cover any deficiencies therein, as operating expenses of your petitioner."

The revenue act of 1918 contains the following provisions pertaining to the issues in the case at bar:

"SEC. 1 [40 Stat. 1057]. That when used in this act—

"The term 'person' includes partnerships and corporations as well as individuals;

"The term 'corporation' includes associations, joint-stock companies, and insurance companies."

"SEC. 503 [40 Stat. 1104]. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 504 of the revenue act of 1917, the following taxes on the issuance of insurance policies: * * *

"(a) Life insurance: A tax equivalent to 8 cents on each $100 or fractional part thereof of the amount for which any life is insured under any policy of insurance or other instrument, by whatever name the same is called: * * *

* * * * * * *

"(d) Policies issued by any corporation enumerated in section 231, and policies of reinsurance, shall be exempt from the taxes imposed by this section.

"SEC. 504 [40 Stat. 1104]. That every person issuing policies of insurance upon the issuance of which a tax is imposed by section 503 shall make monthly returns under oath, in duplicate, and pay such tax to the collector of the district in which the principal office or place of business of such person is located. Such returns shall contain such information and be made at such times and in such manner as the commissioner, with the approval of the Secretary, may by regulation prescribe. * * *"

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" SEC. 231 [40 Stat. 1076]. That the following organizations shall be exempt from taxation under this title:

* * * * * * *

" (3) Fraternal beneficiary societies, orders, or associations (a) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and (b) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents;

* * * * * * *

" (6) Corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual;

* * * * * * *

" (10) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses."

Plaintiff contends that sections 504 and 503 of the revenue acts of 1917 and 1918, respectively, were intended to be, and are, merely reenactments of similar provisions in the Spanish war revenue act of June 13, 1898, 30 Stat. 448. It is unquestionable that section 503 of the revenue act of 1918 is a reenactment of section 504 of the revenue act of 1917, but there is a marked difference between the language covering exemptions in said sections 504 and 503 and that in the Spanish war revenue act of 1898, 30 Stat. 461.

While the language in the three acts covering fraternal beneficiary societies, orders, and associations operating under the lodge system is very similar in the three acts, there is a marked difference in that the act of 1898 specifically mentions and exempts " farmers' purely local cooperative company or association, or employees' relief associations operated on the lodge system, or *local cooperative plan*, organized and conducted solely by the members thereof for the exclusive benefit of its members and not for profit." (30 Stat. 461.) (Italics ours.)

Here it will be seen that in the act of 1898 exemption is given to "farmers'" purely local cooperative companies or associations and "employees' relief associations," operating not only on the lodge system but also on the *local cooperative plan.*

As we have before stated, the exemptions in section 503 (d) of the revenue act of 1918, 40 Stat. 1076, are a practical reenactment, in so far as the issues in this case are concerned, of the exemptions in section 11 (a) of the revenue act of 1916, 39 Stat. 766, and also of those in the revenue act of 1917, 40 Stat. 316, section 504 (d), for the act of 1917 embraces by reference thereto the exemptions contained in section 11 (a) of the revenue act of 1916, 39 Stat. 766.

It is disclosed in plaintiff's brief that when the revenue act of 1917 was reported to the House it contained the following provision, taken from the revenue act of 1898, as the committee report discloses:

"SEC. 504. That from and after the first day of June, 1917, there shall be levied, assessed, collected, and paid the following taxes on the issuance of insurance policies:

"(a) Life insurance: A tax equivalent to eight cents on each $100 or fractional part thereof of the amount for which any life is insured under any policy of insurance, or other instrument by whatever name the same is called: *Provided,* That the provisions of this subdivision shall not apply to any fraternal, beneficiary society or order, or farmers' purely cooperative company or association or *employees' relief associations operated on the lodge system or local cooperative plan, organized and conducted solely by the members thereof for the exclusive benefit of its members and not for profit.*" (Italics ours.)

Had this provision referring specifically to "employees' relief associations" remained in the bill, it might well be argued, discarding for the moment any question as to the meaning of the phrase "local cooperative plan," that it would relieve plaintiff from the tax in question; but it was stricken from the bill by amendment, and in its place the exemptions of section 11 (a) (Third) of the revenue act of 1916, 39 Stat. 766, were incorporated in the 1917 act, by reference thereto, as follows:

"SEC. 11. (a) Third. Fraternal beneficiary society, order, or association, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents; * * *"

We have shown that the exemptions in section 231 of the revenue act of 1918, 40 Stat. 1076, were a practical reenactment of section 11 (a) of the revenue act of 1916, 39 Stat. 766, and that the 1917 act also included the provisions of said section 11 (a).

It seems to us that the elimination of the specific provisions in the revenue act of 1917, as first reported to the House, exempting "employees' relief associations operated on the lodge system or local cooperative plan, organized and conducted solely by the members thereof for the exclusive benefit of its members and not for profit," is very persuasive as indicating the intention that they were not to be exempt, unless they may be classed as fraternal beneficiary associations operating on the "lodge system," which will be discussed hereafter. Yet, as we understand the plaintiff's contention, it claims that section 231 of the act of 1918 and section 11 (a) of the act of 1916, which are practically identical, means the same thing as the omitted clause.

"The rejection by Congress of a specific provision contained in an act as originally reported is most persuasive to the conclusion that the act should not be so construed as in effect to include that provision." (First Fed. Stat. An. 2nd ed., sec. 45.)

"The fact that this provision measuring the amount of recovery by rebate was omitted from the act, as finally reported to both Houses and passed, is not only significant but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee but a statement, made by a member of the Senate conference committee, to support the present argument that section 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical

that which is radically different." *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 198.

"But it is a familiar canon of interpretation that all former statutes on the same subject, whether repealed or unrepealed, may be considered in construing the provisions that remain in force." *Viterbo* v. *Friedlander*, 120 U. S. 707, 725.

See also *United States* v. *Saunders*, 22 Wall. 492; *United States* v. *Farden*, 99 U. S. 10.

Plaintiff's brief shows that when the revenue act of 1898 was under discussion in the Senate the provision with reference to life insurance in the bill contained the following exemption:

"That the provisions of this section shall not apply to any fraternal beneficiary society or order operated on the lodge system which is organized and conducted by the members thereof for the sole benefit of its members and not profit."

The above provision is similar to that in (3), section 231, of the revenue act of 1918.

Plaintiff sets forth in its brief the discussion which took place with reference to the question whether the above exemption embraced "employees' relief associations" when conducted for their own benefit and not for profit. Senators Aldrich and Wolcott expressed the opinion that they were within the exemptions.

Plaintiff quotes Senator Aldrich as saying:

"And I understand the lodge system to be an aggregation of employees or farmers or anybody else who carry on beneficiary insurance simply for their own benefit. That language was used in the statute heretofore and it has been construed to apply to that class of organization."

Plaintiff quotes Senator Spooner as saying:

"I think the Senator has drawn this so as to include a great many that ought not to be taxed."

Without entering into a discussion of how far the courts will go in considering the debates in Congress in interpreting statutes, we may observe, that Senator Aldrich's view was not accepted is indicated by the fact that the provision was subsequently amended to read specifically referring to "em-

ployees' relief associations" operating both under the "lodge system" and "local cooperative plan," viz:

"*Provided*, That the provisions of this subdivision shall not apply to any fraternal, beneficiary society or order, or farmers' purely cooperative company or association or employees' relief associations operated on the lodge system or local cooperative plan, organized and conducted solely by the members thereof for the exclusive benefit of its members and not for profit." (30 Stat. 461.)

We are not content to rest our decision on any conclusion we may draw from the elimination of specific reference to "employees' relief associations" from the act of 1917, or its insertion in the act of 1898, however significant or persuasive such action on the part of Congress may appear.

We shall consider whether plaintiff is within any of the exemptions mentioned in (d) of section 503 of the act of 1918, which provides that "policies issued by any corporation enumerated in section 231 and policies of reinsurance shall be exempt from the taxes embodied by this section."

Section 1, *supra*, of the act of 1918 provides that when used in this act—

"The term 'person' includes partnerships and corporations, as well as individuals;

"The term 'corporation' includes associations, joint-stock corporations, and insurance companies."

Plaintiff alleges in its petition that "for the benefit and protection of its employees a certain voluntary association was organized under the general auspices of your petitioner known as the 'relief department.'" At other places in the petition the "association" is referred to. In the regulations the "relief department" is referred to as "a department of the company's service, of the nature of a mutual benefit association." Approximately 10,000 employees of plaintiff were members. The affairs of the relief department were managed by executive officers, with duties similar to corporate officers, with an advisory committee exercising executive supervision analogous to that of the board of directors of a corporation.

Plaintiff's relief department is certainly within the purview of the language employed by Judge Graham in *Hard-*

ware Underwriters et al. v. *United States*, 65 C. Cls. 267, where he states:

"The association is not incorporated, but this does not alter the fact that it is, in substance and in result of its operations, a mutual insurance company or a reciprocal association for the purpose of making insurance and securing protection and paying losses. * * * To say that such an association is a mere place is to say that a written constitution that has been put in operation is still nothing more than a scrap of paper. This association is not a mere place; it is a living entity, doing an insurance business through cooperation of its subscribers with the attorney in fact and advisory committee, and performs all those things necessary to carry on effectively the business of making insurance.

* * * * * * *

"An 'association' has been defined, with approval by the Supreme Court, 'as a body of persons organized for the prosecution of some purpose, without a charter but having the general form and mode of procedure of a corporation.' It is clear in this case that the individuals or subscribers were engaged in the prosecution of a common enterprise, to wit, the business of a mutual insurance company, and had the general purpose and accomplished the same end as a formally incorporated association."

See also *Hecht* v. *Malley*, 265 U. S. 144; *Pickering* v. *Alyea-Nichols Co.*, 21 Fed. (2d) 501; and *Philadelphia & Reading Relief Association*, 4 B. T. A. 713, 722.

Plaintiff contends that the contract entered into between the members of the relief department and itself is not a contract of insurance but one of beneficial relief, and cites, in support of this contention, *Beck* v. *Penna. Railroad*, 63 N. J. L. 232, as a leading case on the subject, involving a relief department similar to plaintiff's relief department.

Plaintiff's brief, in quoting from the above decision in the *Beck case*, italicizes the following: "*the contract between them is not of insurance but of beneficial relief.*" And also italicizes the following: "*not one of insurance, within the laws appealed to.*"

In order to estimate the weight to be given to the *Beck case*, we think that there should be applied to it the observation of Chief Justice Marshall in the case of *Cohens* v. *Virginia*, 6 Wheat. 399:

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"It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Also the following from Corpus Juris 15, page 941:

"Accordingly, in applying the rule of *stare decisis* to a former decision, the language of the opinion in the earlier case must be construed with reference to the particular facts presented in that case."

In the *Beck case* plaintiff Beck sued the railroad company to recover for a personal injury. The regulations governing the relief department of the railroad and the application for membership provided that the acceptance of benefits from the relief fund for injury or death should operate as a release for all claim for damage arising from injury or death.

Plaintiff Beck objected to the introduction of the release in evidence, on the ground that under the laws of New Jersey no contract to indemnify any person against loss by casualty to property or health or life could be made, except by one incorporated for that purpose under the laws of a State or a foreign corporation formed for that purpose, which has complied with the State laws and obtained authority to transact its business in the State.

The trial judge excluded the evidence. The Court of Errors and Appeals reversed the lower court and held the evidence admissible, and in addition to the excerpt from the opinion quoted in plaintiff's brief, said:

"The purpose of the legislation appealed to is to regulate the business of insurance of various kinds by corporations who propose to do such business and who hold themselves out as ready to contract for insurance with any person who applies and agrees to the terms on which they offer to insure. If it be conceded that such business is a proper subject of

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legislative regulation, it is obvious that such regulations are not to be extended beyond the business intended to be regulated." (63 N. J. L. 241.)

It is apparent that the New Jersey court held merely that the contract of insurance with Beck was not one of insurance within the meaning of laws of New Jersey prohibiting the execution of such contracts except by corporations authorized for that purpose. The effect of the holding was merely that the contract between Beck and the railroad company did not fall within the regulation of the insurance laws. We can not consider the *Beck case* applicable in view of the very comprehensive language in section 503 (a), *supra*, of the act of 1918, which is as follows:

"(a) Life insurance: A tax equivalent to 8 cents on each $100 or fractional part thereof of the amount for which any life is insured under any policy of insurance or other instrument, *by whatever name the same is called:* * * *." (Italics ours.)

Whatever may be the pertinency of the *Beck case*, the comment of the court in *Boston & M. R. R.* v. *United States*, 265 Fed. 578, is in point, and equally applicable to State decisions, as well as to State statutes:

"If the principle were once accepted that the express terms of a Federal law imposing a Federal tax may be abridged, or enlarged, by force of local statutes, the General Government, as a result, would be forced to adopt different standards, and differing rules of taxation among the States—varying in accordance with the differing statutes of the various States, though the power to tax for Federal purposes resides with a single entity and emanates from a central and paramount government. And, as a result of such diversity, there would be no uniformity, though governments exercise the essential and necessary power to impose the burdens of taxation under the impulse of the rightful and governing principle involved in the cardinal idea of uniformity."

Plaintiff's contract with the employees joining the relief department provided for payments ranging from $250 to $1,250 in case of death. To deny that this was a contract of life insurance under "any policy of insurance, or other instrument, by whatever name the same is called," is to deny the obvious meaning of language.

Plaintiff's contract certainly meets all the requirements of various definitions of a contract of insurance. Premiums were paid for insurance by members of the relief department, by an assignment of their wages, while they were in the employ of the company, if they were on the wage roll, if not by payments in cash, and after their severance of employment with the company, by payment of premiums in cash. In case of death their beneficiaries are paid as stated before.

Mr. Justice Gray, in *Commonwealth* v. *Wetherbee*, 105 Mass. 149, defines a contract of insurance as follows:

"A contract of insurance is an agreement by which one party for a consideration, which is usually paid in money, either in one sum or at different times during the continuance of the risk, promises to make a certain payment of money, or the destruction or injury of something in which the other party has an interest. In fire and marine insurance, the thing insured is property; in life or accident insurance, it is the life or the health of a person. All that is requisite to constitute such a contract is the payment of the consideration by the one and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by the contingency contemplated in the contract."

Joyce on Insurance, volume 1, section 7, defines life insurance as follows:

"Life insurance is a contract dependent upon human life, whereby one for a consideration agrees to pay another a certain sum of money upon the happening of a given contingency, or upon the termination of a specified period."

"A 'contract of life insurance' is an agreement between insurer and insured whereby the insurer undertakes to pay a certain sum of money to a certain person, who usually is a person other than insured, upon the happening of a particular event, usually the death of insured, in consideration of payment of insured of certain stated premiums." *Baltimore Life Insurance Co.* v. *Floyd*, 5 Boyce (Del.) 201, 91 Atl. 653.

See also *Ritter* v. *Mutual Life Insurance Co.*, 169 U. S. 139; *State* v. *Alley*, 96 Miss. 720, 51 South. 467.

It remains to be seen whether, within the intent and meaning of any of the provisions of section 231 of the

revenue act of 1918, plaintiff is exempt from the payment of the taxes imposed.

The following provisions, covering exemptions, are thought to be applicable by plaintiff:

"SEC. 231. That the following organizations shall be exempt from taxation under this title:

* * * * * * *

"(3) Fraternal beneficiary societies, orders, or associations, (a) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and (b) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association, or their dependents;

* * * * * * *

"(6) Corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual;

* * * * * * *

"(10) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses."

It is well to refer here to some of the principles which have guided the courts in determining whether the taxpayer is entitled to exemption.

"Statutes and provisions exempting persons or property from taxation are strictly construed. * * *

"Legislation which is claimed to relieve any species of property from its due proportion of the general burdens of government should be so clear that there can be neither reasonable doubt nor controversy about its terms." *Sutherland* "*Statutory Construction*," section 539.

"The claim for exemption must be clearly made out. Taxes being the sole means by which the State can maintain its existence, any claim on the part of anyone to exemption from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or

ambiguity in the language upon which the claim is based. It has been said that where there is a well-founded doubt it is fatal to the claim." *Hardware Underwriters et al.* v. *United States*, 65 C. Cls. 267.

This court said in *New York Trust Co.* v. *United States*, 63 C. Cls. 102:

"Plaintiff is claiming the benefit of an exemption from taxation, and the burden is upon it to show clearly that it is within the exemption claimed. *Phoenix Fire & Marine Insurance Co.* v. *Tennessee*, 161 U. S. 174; *Chicago, Burlington & Kansas City R. R.* v. *Guffey*, 120 U. S. 569, 575; and *Metcalf & Eddy* v. *Mitchell*, *supra*."

The language of the Supreme Court in *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146, is very pertinent to the case at bar, in determining the applicability to plaintiff of the provisions above cited, from section 231 of the act of 1918:

"These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of anyone to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption where such claim is not founded upon the plain and clearly expressed intention of the taxing power."

The remarks of the court in *Cornell* v. *Coyne*, 192 U. S. 418, 431, are very pertinent both as to the strictness of the rule to which the taxpayer is held who claims a statutory exemption and as a reply to the argument in plaintiff's brief in the case at bar: "A literal interpretation of this statute, therefore, leads to the illogical conclusion that Congress intended to impose a tax upon the issuance of any kind of insurance policy, but permitted a certain class of persons to issue any kind of insurance policy without being subject to the tax."

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In *Cornell* v. *Coyne* the court said:

"Clearly there is nothing in the body of the act exempting exported filled cheese from the ordinary manufacturing tax on other filled cheese. But if there were a doubt as to the meaning of the statute, that doubt should be resolved in favor of the Government. Whoever claims a privilege from the Government should point to a statute which clearly indicates the purpose to grant the privilege.

"'But if there be any doubt as to the proper construction of this statute (and we think there is none), then that construction must be adopted which is most advantageous to the interests of the Government. The statute being a grant of a privilege must be construed most strongly in favor of the grantor. *Gildart* v. *Gladstone*, 12 East 668, 675; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544; *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66; *The Binghamton Bridge*, 3 Wall. 51, 75; *Rice* v. *Railroad Co.*, 1 Black 360, 380; *Leavenworth, Lawrence & Galveston Railroad* v. *United States*, 92 U. S. 733; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659.' *Hannibal, &c., Railroad Co.* v. *Packet Co.*, 125 U. S. 260, 271.

"Why Congress should grant an exemption from manufacturing tax in the case of exported tobacco and not in the case of exported filled cheese is not for us to determine. Doubtless the reasons which prompted such difference were satisfactory. It is enough that no exemption has been made in favor of the latter."

It is plaintiff's contention that Congress intended to impose the tax in question only on the issuance of policies by those engaged in the insurance business for profit.

The same contention was made in *Bankers' & Planters' Mut. Ins. Ass'n* v. *Walker*, 279 Fed. 53, involving the identical provisions under the revenue act of 1917, but the Circuit Court of Appeals held:

"This contention is unsound, because this is a purely life insurance arrangement and business, and section 504 does not require profits or dividends as a prerequisite to this tax."

Plaintiff's "relief department" possesses none of the indicia of a fraternal beneficiary society, order, or association, operating under the lodge system, to bring it within the provisions of (3), section 231, *supra*.

We think that article 514 of Regulations 45 of the Treasury Department, under the revenue act of 1918, properly

defines "fraternal beneficiary societies operating under the lodge system" as they are ordinarily understood:

"Fraternal beneficiary societies: A fraternal beneficiary society is exempt from tax only if operated under the 'lodge system,' or for the exclusive benefit of the members of a society so operating. 'Operating under the lodge system' means carrying on its activities under a form of organization that comprises local branches, chartered by a parent organization and largely self-governing, called lodges, chapters, or the like. In order to be exempt it is also necessary that the society have an established system for the payment to its members or their dependents of life, sick, accident, or other benefits."

The decision of the Board of Tax Appeals, where a similar claim for exemption was made, is in point:

"In dealing with cases coming under section 231 of the revenue act of 1918, the character of the organization must be judged by its articles of incorporation, constitution, and by-laws, or by what other instrument it is governed. *Corley* v. *Travelers' Protective Association, supra; Berry* v. *Knights Templars' & Masons' Life Indemnity Co., supra.* Search the petitioner's governing regulations as we may (it is the only instrument which has been offered to us), we are unable to discover, even in a remote degree, a single fraternalistic feature in its organization. It is entirely without any social features. Its membership is made up of individuals whose vocations are as numerous and diverse as the classifications of employment of a great railway system; the section hand, the freight hustler, the brakeman, the conductor in charge of a fast transcontinental train, the locomotive engineer, the train dispatcher, the clerk in the office, all are entitled to membership in the association for the mere asking, expressed in written application, provided no disability exists; and yet none of these look to the petitioner for any betterment in social and laboring conditions. There is no fraternal object which moves them to seek membership in the association, but rather the motive is mercenary. The petitioner has neither lodges, rituals, ceremonial, or regalia; and it owes no allegiance to any other authority or jurisdiction. It is not a 'fraternal beneficiary association' operating under the lodge system, within the meaning of section 231 (3) of the revenue act of 1918, and therefore is not entitled to exemption under the provisions of that section." *Appeal of Philadelphia & Reading Relief Association*, 4 B. T. A. 713, 726.

It is equally clear that plaintiff can not escape the tax under (6), section 231, *supra*, which exempts religious, charitable, scientific, and educational organizations. Obviously, plaintiff does not come within any of these four classes. Nor can we see how plaintiff falls within the exemptions of (10), section 231, aside from any question as to whether plaintiff's "relief department," operating in six different States, may be considered an organization of a "purely local character."

(10) provides for exemptions for—

"Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses."

It could not be contended, with any degree of plausibility, that farmers' organizations, other than those operated under the lodge system, could be exempt from the life-insurance tax under section 231, and certainly not under (10); for under that subdivision the farmers' organizations are granted an exemption for hail, cyclone, and fire insurance.

Under the principle of *expressio unius est exclusio alterius*, exemption for farmers' organizations could not be extended to life insurance under (10). Then, how can it be successfully urged that life-insurance tax exemption is extended to the "like organizations" referred to in (10)?

It will be recalled, as above stated, that when the bill which became the act of 1917 was reported to the House it contained a specific provision exempting "farmers' purely cooperative company or association or employees' relief associations operated on the * * * local cooperative plan * * *."

This provision was stricken from the bill, and, in lieu thereof, that which is substantially section 231 of the act of 1918 was inserted. We do not find any life-insurance tax exemption left in section 231 for farmers' organizations operating on the local cooperative plan, as distinguished from those operating under the lodge system, for (10) con-

fines the farmers' exemptions to mutual hail, cyclone, and fire insurance companies. It would, indeed, be singular to read into (10) a life-insurance tax exemption extended to employees' relief associations and not to the farmers' companies.

In *Neal* v. *Clark*, 95 U. S. 708, the court says:

"It is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.' So, also, 'the meaning of a word may be ascertained by reference to the meaning of words associated with it.'"

The court further quotes from Broom's Legal Maxims:

"In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and consequently the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject matter."

"It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used." *Virginia* v. *Tennessee*, 148 U. S. 519.

"It would ignore the fact that the meaning of words is affected by their context and violate the settled rule that words which standing alone might have a wide and comprehensive import will, when joined with those defining specific acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration, or class. *Cf. Virginia* v. *Tennessee*, 148 U. S. 503, 519; *United States* v. *Chase*, 135 U. S. 255, 258; *Neal* v. *Clark*, 95 U. S. 704, 708." *United States* v. *Salen*, 235 U. S. 249.

In *Bankers' & Planters' Mut. Ins. Ass'n* v. *Walker*, 279 Fed. 53, passing on the identical provision in the revenue act of 1917, the court held that Congress did not intend to include life insurance in the expression "like associations." The court said:

"It is also evident that plaintiff does not come within the 'like organization of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting its expenses' as set out in subdivision 'tenth' of section 11a, above quoted. This is not a 'purely local' organization; its income is not collected for the mere purpose of 'meeting its expenses,' but goes much beyond this and covers insurance payments; and it is not a 'like organization,' such organizations being 'farmers' or other mutual hail, cyclone, or fire insurance company, mutual ditch or irrigation company, mutual or co-operative telephone company.' Life insurance is too well known and important for us to suppose that Congress would detail hail, cyclone, and fire insurance, and intend life insurance to be included in the general expression of 'like associations.' The plaintiff is clearly liable to the tax."

Our view that (10) of section 231 of the act of 1918 did not include life insurance is strengthened by the fact that when said section 231 was reenacted in the revenue act of 1924, 43 Stat. 282, life insurance was added to the provisions of (10) as follows:

"(10) Benevolent life insurance associations of a purely local character, farmers' or other mutual hail, cyclone, casualty, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 per centum or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses.

"It is an accepted principle that for purposes of statutory construction, within certain limits, resort may be had to subsequent statutes." *Douglas* v. *Edwards*, 298 Fed. 229, 238. Citing, with other cases, *Smietanka* v. *First Trust & Savgs. Bank*, 257 U. S. 602, and *Shwab* v. *Doyle*, 258 U. S. 529.

In the *Smietanka case*, *supra*, Mr. Chief Justice Taft said:

"It is obvious that, in the acts subsequent to that of 1913, Congress sought to make specific provision for the *casus omissus* in the earlier act.

"The case is not unlike that of *United States* v. *Field*, 255 U. S. 257. The revenue act of 1916 imposed a tax on the estate of a decedent at the time of his death. The Government sought to tax property passing under a decedent's testamentary execution of a general power of appointment. It was held that, while in equity, property passing under

Reporter's Statement of the Case

such a power might be treated as assets of the donee for the use of his creditors if executed in favor of a volunteer, it was not subject to distribution as part of the estate of the donee and was not taxable. In the later act such property was expressly included. This was thought by the court to show at least a legislative doubt whether the earlier act included such property."

In *Shwab* v. *Doyle*, *supra*, the Supreme Court said:

" In the revenue act of 1918, 40 Stat. 1097, it reenacted section 202 of the act of September 8, 1916, and provided that the transfer or trust should be taxed whether 'made or created before or after the passage of' the act. And we can not accept the explanation that this was an elucidation of the act of 1916, and not an addition to it, as averred by defendant, but regard the act of 1918 rather as a declaration of a new purpose, not the explanation of an old one."

We are of the opinion that plaintiff's petition should be denied. Petition will be dismissed. It is so ordered and adjudged.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

EDMUND M. BROWN v. THE UNITED STATES

[No. E-262. Decided December 3, 1928]

On the Proofs

Army pay; training for commission; act of June 15, 1917; overseas school.—See *Owen* v. *United States*, 64 C. Cls. 496.

Same; pay after June 30, 1918.—The act of June 15, 1917, was a deficiency appropriation and did not authorize pay at the rate of $100 per month beyond June 30, 1918, to enlisted men in training for commissions. Nor was said rate authorized by the appropriation act of July 9, 1918, or of November 4, 1918.

The Reporter's statement of the case:

Mr. Henry W. Driscoll for the plaintiff.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. M. C. Masterson* was on the brief.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. The plaintiff, Edmund M. Brown, enlisted in the service of the United States January 8, 1918, and was assigned the same day as a private, first class, to the officers' training school at Camp Custer, Michigan. On April 24, 1918, he was appointed sergeant, and on the same day was ordered to proceed to Camp Jackson and to report May 6, 1918, to the commanding general Field Artillery replacement depot for duty. May 4, 1918, he was transferred to Camp Jackson, and May 23, 1918, sailed from the United States in a reserve officers' training camp detachment, and pursuant to further orders he reported June 9, 1918, at the Saumur Artillery School, France, for a course of instruction. He was discharged from the school July 11, 1918, to accept a commission, which he accepted on July 12, 1918.

II. The plaintiff received pay for his enlisted services as follows:

Pay as Pvt. for January 8, 1918, 1 day @ $30 per mo	$1.00
Pay as Pvt. 1 cl. from January 9, 1918, to April 15, 1918, 3 mos. and 7 days @ $33 per month	106.70
Pay as Sgt. from April 16, 1918, to May 22, 1918, 1 mo. and 7 days @ $38 per month	46.87
Pay as Sgt. from May 23 to July 11, 1918 (foreign service), 1 mo. and 19 days @ $44 per month	71.87
Total	226.44

If plaintiff is entitled to pay at $100 per month for the period of his training for commission at Camp Custer (January 8, 1918, to April 19, 1918), the difference due him would be $227.23, computed as follows:

Debits

Pay received as Pvt. for January 8, 1918, 1 day @ $30 per month	$1.00
Pay received as Pvt. 1 cl. from January 9, 1918, to April 15, 1918, 3 mos. and 7 days @ $33 per month	106.70
Pay received as Sgt. from April 16 to 19, 1918, 4 days @ $38 per month	5.07
Total	112.77

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Credits

Pay at $100 per month from January 8 to April 19, 1918, 3 mos. and 12 days	$340.00
Difference	227.23

Assuming the plaintiff to be entitled to pay at $100 per month for "the intervening period during April and May, 1918," i. e., April 20 to May 14, 1918, there would be due him $51.66, computed as follows:

Debits

Pay received as Sgt. from April 20 to May 14, 1918, 25 days @ $38 per mo	$31.67

Credits

Pay at $100 per month, 25 days	$83.33
Difference	51.66

If plaintiff is entitled to pay at $100 per month for the period May 15 to June 30, 1918, both dates inclusive, the difference due to plaintiff would be $87.47, computed as follows:

Debits

Pay received as Sgt. from May 15, to 22, 1918, 8 days @ $38 per mo	$10.13
Pay received as Sgt. from May 23 to June 30, 1918 (foreign service), 1 mo. and 8 days @ $44 per mo	55.73
Total	65.86

Credits

Pay at $100 per month for 1 month and 16 days	$153.33
Difference	87.47

If entitled to pay at $100 per month for all periods mentioned above, i. e., from January 8, 1918, to June 30, 1918, the plaintiff would receive $366.36, computed as follows:

For period January 8 to April 19, 1918	$227.23
For period April 20 to May 14, 1918	51.66
For period May 15 to June 30, 1918	87.47
Total	366.36

The court decided that plaintiff was entitled to recover $366.36.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff, Edmund M. Brown, entered the military service of the United States as an enlisted man on January 8, 1918, and was assigned the same day as a private, first class, to the officers' training school at Camp Custer, Michigan. On April 24, 1918, he was appointed sergeant and ordered to proceed to Camp Jackson, there to report to the commanding general for duty. On May 4, 1918, he was transferred to Camp Jackson, and, under further orders, he reported June 9, 1918, at the Saumur Artillery School, France. He was discharged from the school July 11, 1918, and granted a commission.

During the period of his service until he was given a commission the plaintiff was paid only at the rate provided for the grades of enlisted man and sergeant for the period served in each capacity.

Congress provided by the act of June 15, 1917, 40 Stat. 188, that enlisted men of all grades in the Army, while in training for officers of the Reserve Corps, should be paid $100 per month. Plaintiff made claim for the extra pay, but it was disallowed, and this action is for the recovery of the difference between $100 per month and the amount actually paid the plaintiff from the date he entered the service to the time when he was discharged from the officers' training school in France, in all $386.89.

The claim of the plaintiff for the period from January 8, 1918, to June 30, 1918, is sustained by the decision of this court in the case of *Cyril Benson Owen* v. *United States*, 64 C. Cls. 496, and for this period he is entitled to recover $366.36. This is practically conceded by counsel for defendant.

We think the decision of the Supreme Court in *United States* v. *Rider*, 261 U. S. 363, determines that plaintiff is not entitled to recover the balance of his claim. It is therein said, with reference to the act of June 15, 1917, above referred to:

"This, * * * was a deficiency appropriation and therefore did not authorize pay at the rate of $100 beyond June 30, 1918."

The court also said:

"After we had been a year in the war, and a draft act had been passed, no further necessity existed for inducement to civilians to train as officers, and no further provision after June 30, 1918, was made for pay to them. Training camps were continued until November 11, 1918, but the appropriations for them were only for arms and ordnance equipment. Army appropriation act, July 9, 1918, 40 Stat. 876."

The plaintiff relies on the appropriation acts of July 9, 1918, and November 4, 1918, both of which made an appropriation "for pay of enlisted men of the line." If Congress had intended that enlisted men of the line, when in the training school during the period in controversy should receive pay at the rate of $100 per month, we think it would have specifically so stated, as it did in the act of June 15, 1917.

It follows that the plaintiff is only entitled to recover $366.36, for which sum judgment will be entered in his favor. It is so ordered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JOHN L. MIMNAUGH, JR., EXECUTOR OF THE WILL OF JOHN L. MINNAUGH, DECEASED, v. THE UNITED STATES

[No. F-388. Decided December 3, 1928]

On the Proofs

Jurisdiction; valuation of taxable property.—The courts have jurisdiction to review the determination of the Commissioner of Internal Revenue of the value of property for purposes of taxation.

Estate-transfer tax; insurance payable to estate taken out prior to estate tax law.—Life insurance, paid to decedent's estate, must be considered a part of the gross estate in computing the estate-transfer tax, notwithstanding such insurance was taken out prior to passage of any estate-transfer tax law. *Lewellyn* v. *Frick*, 268 U. S. 238, distinguished.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiff.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, John L. Mimnaugh, jr., is the duly appointed executor of the will of John L. Mimnaugh, who died January 9, 1921, a citizen of the United States and a resident of the State of South Carolina.

II. The plaintiff, as such executor, duly made and filed as required by law an estate-tax return for the estate of the aforesaid decedent and duly paid the taxes therein indicated to be due in the amount of $65,994.45 to the collector of internal revenue for the district of South Carolina.

III. Thereafter the Commissioner of Internal Revenue, upon an audit of the aforesaid return, determined and notified the plaintiff that the estate-tax liability of the estate of the said decedent was $110,071.83, and he thereupon assessed additional taxes against the said estate in the amount of $44,077.38, which was paid by the plaintiff to the said collector on September 18, 1922.

IV. On April 14, 1926, plaintiff duly made and filed, as required by law, a claim for refund of $41,257.36 (or such greater amount as is legally refundable) of said taxes, predicating the said claim upon the action of the said commissioner in increasing the value of decedent's interest in three certain parcels of real estate situate, respectively, at the northwest corner of Main and Hampton Streets, the southeast corner of Main and Hampton Streets, and the southwest corner of Blanding and Barnwell Streets, in the city of Columbia, State of South Carolina; and further predicating the said claim upon the valuation found by the commissioner of the decedent's interest in 350 shares of the stock of Palmetto National Bank; and further predicating his claim upon the action of the commissioner in including in the gross estate of the said decedent $50,000 as the amount of life insurance which was paid to his executor on policies taken out by the decedent on his own life; and further

predicating the said claim upon the action of the commissioner in increasing the value of certain miscellaneous property which formed a part of the gross estate of the decedent.

V. The Commissioner of Internal Revenue on November 17, 1926, rejected in its entirety the plaintiff's aforesaid claim for refund.

VI. In computing the value of the gross estate of the said decedent, the Commissioner of Internal Revenue determined the value of the decedent's interest in the parcel of real estate located at the northwest corner of Main and Hampton Streets, Columbia, S. C. (known as the store property), to be $300,000; the real estate at the southeast corner of Main and Hampton Streets, in said city of Columbia (known as the hotel property), to be $250,000; the real estate at the southwest corner of Blanding and Barnwell Streets, in said city of Columbia, to be $20,000; the value of the decedent's interest in the said 350 shares of the stock of the Palmetto National Bank to be $59,500; the value of the decedent's interest in miscellaneous property, consisting of the stock of goods, wares, and merchandise, fixtures, book accounts, delivery trucks, and other personal property, to be the sum of $225,000; and included in the gross estate, in the amount of $50,000, the proceeds of seven policies of life insurance taken out by the decedent on his own life, and which were paid after his death to his executors.

The total value of the net estate of the decedent upon which the aforesaid taxes were imposed and collected was determined by the said Commissioner of Internal Revenue to be the sum of $1,583,931.92.

VII. The value of the decedent's interest at the time of his death, February 9, 1921, in the said parcel of real estate located at the northwest corner of Main and Hampton Streets, known as the store property, was $300,000; and the value at that time of the said parcel of real estate located at the southeast corner of Main and Hampton Streets, known as the hotel property, was $250,000; and the value at that time of the said parcel at the corner of Blanding and Barnwell Streets was $20,000; and the said 350 shares of stock of the Palmetto National Bank was $59,500.

VIII. The said decedent on September 14, 1900, took out a policy of insurance on his own life in the amount of $10,000 with the Mutual Life Insurance Company of New York; and on November 30, 1901, he took out a policy of insurance in the amount of $5,000 with the Equitable Life Insurance Company; and he took out life insurance policies with the Ætna Insurance Company on the dates and in the amounts as follows: September 13, 1897, $10,000; July 20, 1902, $10,000; September 13, 1890, $5,000; September 13, 1898, $5,000; September 13, 1899, $5,000.

The amount of all of the aforesaid insurance policies was paid to the plaintiff as said executor, after the decedent's death, and the whole amount thereof was included in the decedent's gross estate by the Commissioner of Internal Revenue in computing the liability of the said estate for the payment of estate taxes.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

Plaintiff, John L. Mimnaugh, jr., executor of the will of John L. Mimnaugh, deceased, filed an estate-tax return for the estate of decedent and paid on the net value of said estate the tax shown to be due thereon of $65,994.45. Thereafter the Commissioner of Internal Revenue assessed against said estate an additional tax of $44,077.36, which was paid. Plaintiff filed a claim for refund in the sum of $41,257.36, which was rejected. This action is for the recovery of said amount.

The basis of plaintiff's claim is the alleged error of the commissioner in the valuation placed upon three certain parcels of real estate and upon the value of certain miscellaneous property, and also upon the value of 350 shares of stock in the Palmetto National Bank; and upon the further ground that the commissioner erroneously included in the gross estate the amount of the proceeds of life insurance paid on policies taken out by plaintiff's decedent on his own life.

The parcel of real estate located on the northwest corner of Main and Hampton Streets, Columbia, South Carolina,

known as the store property, was valued by the executor in his return at $157,500, and by the commissioner at $300,000; the property located at the southeast corner of said streets, known as the hotel property, was valued by the executor at $157,500, and was increased by the commissioner to $250,000; and the parcel located at the southwest corner of Blanding and Barnwell Streets was valued by the executor at $15,000, and was increased by the commissioner to $20,000.

The executor returned the shares of stock in the Palmetto National Bank as of no value, and the commissioner determined its value to be $59,500. The miscellaneous property referred to, consisting of stock of merchandise, fixtures in storeroom, accounts due, delivery trucks, and other personal property, was valued by the executor at $105,186.25, and was increased by the commissioner to $225,000.

In computing the value of the gross estate the commissioner included the proceeds of certain life insurance policies aggregating $50,000, which plaintiff contends was error.

At the recent hearing of this case, the question having arisen as to the jurisdiction of this court to inquire into the action of the commissioner in determining the value of property for the purpose of computing the estate tax, counsel for the parties hereto were requested by the court to file briefs on that subject, and they have done so. Whatever doubt may have existed on this point, it seems now from an examination of the authorities cited by counsel on both sides to be a settled principle that the courts have jurisdiction to review the determination of the commissioner on the question of the value of property for purposes of taxation. The Department of Justice has consistently followed the rule that the commissioner's findings in this respect are only *prima facie* correct and are not conclusive on the courts. Inasmuch as the parties are in agreement on this point, no further discussion of the question will be indulged.

The two larger parcels of property known as the store property and the hotel property were each valued in the return at $157,500. Plaintiff's own evidence establishes a value for the store property of not less than $262,500 and for the hotel property not less than $210,000. As to all

three parcels of real estate, and as to the miscellaneous personal property, the evidence amply sustains the values determined by the commissioner.

The commissioner determined the value of the Palmetto National Bank stock to be $170 per share. Plaintiff contends that said stock had no value as of the date of the death of the testator, January 9, 1921. The Palmetto National Bank failed in July, 1923, some two and one-half years after the death of plaintiff's decedent, and its assets and liabilities were taken over by the Columbia National Bank, and its entire surplus and capital, amounting to $1,256,000, were at once charged off. There was much worthless paper in the assets of the bank. Stockholders of the Columbia National Bank contributed $250,000 to cover the losses of the defunct bank. Later a further assessment of $500,000 was made against said stockholders. From these facts concerning the condition of its affairs in July, 1923, it was the conclusion of plaintiff's chief witness on that subject that the stock had no value in January, 1921. It appears, however, that the appraisers appointed by the probate court of the county of decedent's residence valued said stock at $52,500 for the 350 shares as of February 28, 1921, and other evidence shows that sales of such stock were made at $170 on or about January 9, 1921. Said stock was not listed on any stock exchange. In computing the gross value of decedent's estate the commissioner determined the value of said stock to be $59,500. It is the contention of plaintiff that it had no value. The burden is on plaintiff to prove its contention. The evidence does not establish plaintiff's claim that it had no value, nor is it satisfactorily shown that it had a less value than that determined by the commissioner.

The remaining question for consideration is the contention of plaintiff that the proceeds of certain policies of life insurance on the life of plaintiff's decedent amounting to $50,000 should not have been included in the gross estate by the commissioner in computing the value of said gross estate. In support of this contention plaintiff relies wholly upon the decision of the United States Supreme Court in the case of *Lewellyn* v. *Frick*, 268 U. S. 238, plaintiff's contention being that the court in that case held that life insurance

taken out before the passage of any estate tax law may not properly be included in the gross estate. The question in this case is clearly distinguishable from that involved in the *Frick case*. In that case there were outstanding at the time of the death of the testator, Henry C. Frick, 11 policies of insurance upon his life, four of which were payable to his wife, and seven to his daughter. The following facts with reference to said policies were agreed:

"Henry C. Frick died on December 2, 1919, and his will was admitted to probate on December 6. There were outstanding policies upon his life, four payable to his wife and seven to his daughter. The total amount received under them was $474,629.52, and as his estate apart from this was more than ten million dollars, an additional tax of $108,657.88, or twenty-five per cent of the sum received less the statutory deduction of $40,000, was required to be paid. All the policies were taken out before the revenue act was passed. The largest one, for $114,000, was a paid-up policy issued in 1901, payable to Mrs. Frick without power in Mr. Frick to change the beneficiary. Another, similar so far as material, was for $50,000. Others were assigned or the beneficiary named (Frick's estate) was changed to Frick's wife or daughter before the date of the statute. All premiums were paid by Mr. Frick, and some seem to have been paid after the statute went into force."

Plaintiff's contention is obviously based upon what we conceive to be a misconception of the meaning of certain language appearing in the opinion of the court in that case, to wit:

"Not only are such doubts avoided by construing the statute as referring only to *transactions taking place after it was passed*, but the general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." (Our italics.)

The "*transactions taking place after it was passed*" obviously refer to transactions with respect to the policies after they were taken out. In that case it was sought to impose the estate tax upon life insurance on the life of the testator, payable, either by original contract or by assignment, to the

Syllabus

wife and daughter. The testator, prior to the enactment of any estate tax act, had divested himself and his estate of every vestige of interest in said policies or the proceeds thereof, and these are the *transactions* which the court was considering when it used the language quoted above. In the present case the policies were all payable to the estate of the decedent, and the proceeds thereof in the hands of his executor were, under the provisions of section 402 (a) of the revenue act of 1918, 40 Stat. 1057, "subject to the payment of the charges against his estate, and the expenses of its administration, and * * * subject to distribution as part of his estate." The principle that the proceeds of life insurance payable to a decedent or his estate constitute assets of the estate seems to be well settled. It has been held that even when the policy is payable to a beneficiary, the proceeds of such policy are still assets of the estate if the decedent has reserved the power to change the beneficiary. *Cohen* v. *Samuels*, 245 U. S. 50; *Gaither* v. *Miles*, 268 Fed. 692; *Knoedler's Estate*, 140 N. Y. 377, 35 N. E. 601; *Voorhees' Estate*, 193 N. Y. Supp. 171. Other cases to the same effect are cited in defendant's brief. We are of the opinion that the proceeds of the insurance policies involved herein were properly included by the commissioner in the gross estate of plaintiff's decedent. It follows from the views hereinabove expressed that the plaintiff's petition must be dismissed. It is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

ITALIAN NATIONAL RIFLE SHOOTING SOCIETY OF THE UNITED STATES v. THE UNITED STATES

[No. F-163. Decided December 3, 1928]

On the Proofs

Lease of premises; implied covenant against voluntary waste.—Although there may be no express covenant in a written lease to repair or to leave the premises in as good condition as when received, there is an implied covenant against voluntary waste.

The Reporter's statement of the case:

Mr. Walter H. Griffin and *Putney, Twombley & Putney* for the plaintiff.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. At all times involved herein the plaintiff, Italian National Rifle Shooting Society of the United States, was and still is a corporation duly organized and existing under and pursuant to the laws of the State of New York. The certificate of incorporation, which was filed on January 14, 1897, recites that the particular objects for which the corporation is to be formed are—

(*a*) To educate its members socially, morally, and intellectually; and

(*b*) To promote among its members the exercise of rifle shooting and general gymnastics and sporting.

II. Neither the plaintiff nor any of its officers have in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States.

III. The plaintiff is the owner of the claim herein sued upon, and no transfer or assignment thereof, or any part thereof or any interest herein, has been made.

IV. On December 6, 1917, and continually thereafter until some time subsequent to May 26, 1922, the plaintiff was the owner in fee of certain premises containing approximately 22½ acres situated in the fourth ward of the borough and county of Richmond, on Staten Island, in the State of New York, which said property is more particularly described in paragraph 2 of the plaintiff's amended petition. It was purchased by the plaintiff on May 5, 1913. The consideration involved was the payment of $10,000 in cash and the assumption by the plaintiff of taxes aggregating $15,000, then assessed against the property.

The property was sold by the plaintiff in May of 1926 for $46,149.60. Twenty-five thousand dollars of the purchase price was paid in cash and the unpaid portion was secured by a mortgage.

V. On or about December 6, 1917, the plaintiff duly entered into a certain written lease with the United States, and subsequently entered into several renewals thereof, whereby the plaintiff leased the premises referred to in Finding IV hereof to the United States. Copies of the said lease and renewal leases are attached to the amended petition as Schedules 1, 2, and 3, and are made a part hereof by reference.

VI. The United States continued in the use and occupation of the said premises under the aforesaid lease and renewals thereof from about the 6th day of December, 1917, to and including the 26th day of May, 1922.

VII. The original lease of December 6, 1917, as did the renewal leases, provided for a monthly rental of one hundred forty-five and 833/1,000 ($145.833) dollars, and contained a provision that "this land is to be used by the United States Government to construct a clearing hospital thereon." Paragraph III provided among other things that "all buildings and other improvements fixed to or erected or placed in or upon the said premises by the lessee shall be and remain the exclusive property of the lessee, provided, however, that the same, unless sold or otherwise disposed of, shall be removed by the lessee within thirty days after the said premises are vacated under this lease." Paragraph X of the said lease reserved to the United States an option to purchase the property leased during the term of the lease or any renewal thereof for $35,000, with a further provision that in the event of the purchase of the property by the United States under the option that all payments of rental made under the said lease or renewals thereof should be applied upon the purchase price, and full credit should be given the lessee for all amounts so paid.

VIII. The property of the Italian National Rifle Shooting Society which was leased by the United States was but a comparatively small part of the Fox Hills tract on Staten Island leased by the Government for a hospital site and had been acquired by the plaintiff in 1913 for the use of its members as a rifle shooting range and had been used for that purpose prior to the leasing of the property to the

Government in 1917. The land was undulating in contour, but with a pronounced general slope upwards from its western extremities. Upon taking possession of the Fox Hills property leased by it the Government of the United States, in order to make all of the property more easily accessible for its purposes, constructed a macadamized roadway, approximately 50 feet wide, through the entire tract by extending Pennsylvania Avenue to the Finger Board Road. That roadway bisected the property of the plaintiff, and in the construction of it certain grading operations were necessary upon the property of the plaintiff. There was a cutting down at certain points along the road and a filling in at other points. Necessary buildings incident to the use of the property as a hospital were erected and water, gas, and sewer pipes were laid. While in possession of the premises the United States constructed a spur of land approximately 600 feet long with an average width of 160 feet at its base and 140 feet across its top and with an average depth of 11 feet upon the property of the plaintiff. Upon that spur the United States built railroad tracks, connecting with the Staten Island Railroad, and also erected warehouses thereon. In its construction of the said spur the United States had removed approximately 35,000 cubic yards of earth from a hill on another part of the premises of the plaintiff. All of the earth which went into the spur was removed from one side of the hill and the remaining portion of said hill was left at an angle greater than 60 degrees on the excavated side. The spur itself was built at an angle to the macadamized roadway hereinbefore referred to, and on the lower part of the plaintiff's property, so that a deep ditch or gully was left between the spur and the roadway. At the point where the spur crossed the plaintiff's property at its northern boundary it was 22 feet higher than the adjoining ground. At another point on the plaintiff's property the United States removed approximately 2,000 cubic yards of earth in making an excavation for the installation of boilers and a coal run for its heating plant. That was the only major excavation made for the purpose of building construction. The other buildings were erected upon concrete foun-

dations, concrete piers, and concrete footings. Some of the foundations and footings were reinforced with steel rods. In some instances concrete floors were built on the ground itself.

IX. Prior to quitting and surrendering said premises the United States on May 26, 1922, conducted an auction sale on said premises by Gerth's Realty Experts, auctioneers, and the terms of said sale, as published at the time of the sale by said auctioneers, contained among other matters the following:

"Purchasers shall also be required to thoroughly clean and clear up the ground area covered by their purchase and with the exception of concrete and masonry, shall remove all foundations, piers, posts, and floors, and shall fill in and level off the excavations resulting from such removals. All débris and rubbish resulting from such operations shall be disposed of to the satisfaction of the representative of the United States Veterans' Bureau and the commanding officer."

X. On the 26th day of May, 1922, the United States quit and surrendered the said premises to the plaintiff and left thereon the spur and the hill in its partially cut down condition, as hereinbefore referred to. After the property sold at the auction sale had been removed, there was left an aggregate of 710 cubic yards of concrete and reinforced concrete foundations, piers, footings, floors, and walls imbedded in the ground. There was also left a large amount of rubbish and débris, consisting in the main of small pieces of broken timber, tar paper, composition roofing, tin, nails, and other building materials scattered over the entire area. Prior to the entering of the United States upon the premises as tenant the premises had been surveyed by a surveyor and boundary stakes had been set out by the surveyor showing the boundaries thereon at a cost to the plaintiff of $500, but when the United States returned the property to the plaintiff the stakes had been totally obliterated and removed.

XI. In the use and occupation of said premises during the period of the said lease and renewals thereof the defendant committed waste. Said waste was not necessary to carry out the purposes for which the premises were

leased, and plaintiff thereby suffered damage to the extent of $16,000.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a suit to recover damages for injury to real estate due to alleged waste committed by the defendant under a written lease. The case is controlled by the principles announced by the court in the case of *United States* v. *Bostwick*, 94 U. S. 53, 68, 69. In that case there was no express agreement to leave the premises in as good condition as when received, ordinary wear and tear excepted, and there is no express agreement in the lease here involved. It was held that, while there was no express agreement to bind the United States to make good any loss which necessarily resulted from the use of the property, it would be liable for any loss resulting from want of reasonable care in its use, and that the defendant was bound not to commit waste or suffer it to be committed; that is to say, that there was an implied covenant which required it not to alter, change, or disfigure the property any more than was necessary for the purpose for which it was leased; that there was an implied obligation, not to repair generally, but to use the property generally so as to make repairs unnecessary as far as possible. In other words, there was a covenant against voluntary waste and nothing more.

As stated, the lease involved here was a written one, but contained no express covenant to repair or to leave the premises in as good condition as when received. The right to recover, therefore, must stand upon the implied covenant and the principles governing it which have just been stated. The findings show that there was voluntary waste and that the injury due to this waste amounted to $16,000, and for this sum the plaintiff is entitled to recover. Judgment should be entered in favor of the plaintiff, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

I. SHAPIRO & CO. v. THE UNITED STATES

[No. D–871. Decided December 3, 1928]

On the Proofs

Sale of surplus supplies "as is"; inspection as a condition of sale; failure to inspect.—See *Triad Corporation* v. *United States*, 63 C. Cls. 151.

The Reporter's statement of the case:

Messrs. James L. Fort, O. H. B. Bloodworth, jr., and *T. L. Bartlett*, and *Milling, Godchaux, Saal & Milling*, for the plaintiff.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a partnership with its principal place of business at New Orleans, Louisiana, and is composed of Isadore Shapiro and Sam Shapiro.

II. On April 27, 1923, the United States, acting through duly authorized officials and representatives of the War Department, offered for sale by auction at the quartermaster intermediate depot, New Orleans, Louisiana, the following articles:

Item No.	S. P. D.No.	Articles and description	Quantity
48	22079	Overalls, denim, blue and brown, unused	28,790 ea.

III. The goods were packed in nailed cases or in bales bound with wire. Samples were exhibited of blue denim overalls and brown denim overalls, both unused.

IV. There was a catalogue of the articles to be sold. Said catalogue stated as follows:

"All property will be sold 'as is' at storage point, without warranty or guaranty as to quality, character, condition, size, color, weight, or kind, or that the same is in condition or fit to be used for the purpose for which it was originally in-

tended or may be intended or desired to be used by the purchaser, except that subsistence stores will be sold subject to the pure food law and guaranteed to be fit for human consumption at the time of sale.

"Certain articles are described as 'unused,' meaning thereby that they have not been used; such articles may be shopworn or otherwise not in first-class condition. Other articles are described as 'used,' meaning thereby that they have been used; such articles may or may not be in need of repairs. These descriptions are obtained from the best information available and are used by the Government for the purpose of establishing an identity of the article to be sold, and for convenience of the purchaser. They are not to be taken as specifications or terms of quality by which the Government is or will be bound. The articles identified by the numbers and descriptions in the catalogue are being offered for sale, and if sold will be delivered to the purchasers whether or not they conform exactly to the descriptions given out.

"All property listed herein will be available for inspection for a period of one week immediately preceding the date of sale, and each bidder or prospective purchaser is invited and enjoined to inspect the property listed for sale at its point of storage prior to the sales date. The failure of any purchaser to inspect the property herein listed and sold, or to acquaint himself with its true condition or quality, will not be considered as sufficient grounds for a claim by any purchaser for an adjustment of the price or rescission of the sale.

"Selected articles of the property to be sold will be on display wherever practicable in the auction room, available for examination between the hours of 9 a. m. and 3 p. m. from Friday, April 20th, 1923, and daily thereafter (Sunday excepted) until the conclusion of the sale. These articles are exhibited for the convenience of the bidders and prospective purchasers; they are believed to be representative of the average type of the property for sale, but are not samples as the term is used commercially. The Government gives no warranty of their similarity to the property to be sold and will not be bound by any representation that they are samples or representative articles.

"The quality of the property to be sold is to be determined by each bidder to his satisfaction by inspecting the property in storage. No person is authorized to bind the Government by any statement or representation as to quantity, quality, character, size, color, weight, or kind of any property offered at this sale, and any such statements or representations will be made without authority from the Government and will not be considered as grounds for a

claim by any purchaser for the adjustment or rescission of any sale. The articles exhibited at the time of sale are not to be taken as representative samples, fixing the quality of the other articles of the same lot."

V. The sale was advertised by sending out the catalogues containing the list of articles to be sold, which catalogues were mailed to prospective bidders about two weeks before the time of the sale. Plaintiff received a catalogue some time before the sale. Defendant had instructed its storekeeper to allow inspection of the property to be sold and to give inspectors labor, when requested by them, in order to assist them in making proper inspection. At the opening of the sale, April 27, 1923, the auctioneer announced to all of the bidders present at the time: "We will now open a surplus property sale as advertised in the catalogue, and the sale will be conducted in accordance with the conditions and terms as printed in the catalogue." The method of conducting the sale consisted in a display of a selected sample of the article to be sold, this being held up between the auctioneer and the bidders while the sale of that particular article was going on. The articles were sold to the highest bidder. Plaintiff did not go to examine any of the overalls to be sold until the day of the sale and made no examination of them except of the samples exhibited, nor did he ever ask the defendant to open up any bales. On the day preceding the sale there were at least eighteen bales opened and one box. This lot of overalls was sold to the plaintiff as the highest bidder at $0.88¾ a pair for the entire lot, accompanying its bid with 20 per cent of the amount bid. After plaintiff had paid this 20 per cent and prior to the completion of the purchase plaintiff sought to examine the entire lot, but this permission was refused him by the defendant until the remaining 80 per cent of the purchase price was paid, and thereupon the plaintiff paid the 80 per cent.

VI. Plaintiff made complaint after he had purchased the goods that they did not correspond to the samples he had examined. An officer of the defendant was detailed to the

Brooklyn depot to make an inspection of the overalls purchased by plaintiff. He inspected 40 bales, 2,720 blue overalls, and found 4 new denim jumpers, 4 coats, cotton O. D., used; also found among 10 bales some 680 pairs of brown overalls.

Plaintiff was allowed to return to the defendant 270 pairs of overalls, assorted duck, unused; 146 pairs of trousers, working, unused; 20 each coats, cotton khaki, used; 1 each jumper, denim, unused. About 2 per cent of the garments defendant inspected were of a different color from blue or brown, namely, gray.

The defendant refunded to the plaintiff the money covering the articles returned at the same rate it had paid for them.

VII. Before any return was made and pending defendant's determination to permit any return, plaintiff had disposed of about 2,000 dozen overalls at $8.25 per dozen f. o. b. New York, and also a lot of about 700 pairs at $8.25 per dozen f. o. b. New York; also, to people in his store, several quantities at different prices, some at $9.00, some at $10.00, and some at $12.50 a dozen. The overalls thus disposed of plaintiff estimates was at an actual loss of $5,184.71 over the purchasing price.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff is a copartnership, with its principal place of business at New Orleans, La. The Government, after the close of the war, offered for sale through catalogue advertisement 28,790 ea. overalls, listed as "Denim, blue and brown, unused." The actual sale occurred on April 27, 1923, on which date the plaintiff bid for the lot the sum of 88¾ cents per pair, or a total purchase price of $25,542.25. The bid was accepted and the terms of sale complied with. The facts, about which there is no dispute, are that the auctioneer on the date of sale exhibited to bidders two unused pairs of denim overalls, one pair of blue and the other brown in color.

Opinion of the Court

The plaintiff made a superficial inspection of the merchandise prior to the bid, but did not inspect the entire contents of the nailed cases and packed bales containing the same. Subsequent to the completion of the sale and the payment of the purchase price the plaintiff discovered that the goods were not in all respects in accord with the exhibited samples; many pairs of overalls were gray in color and a vast number of inferior quality and grade. Plaintiff seasonably protested to the officers against the conditions found and preferred a claim for reimbursement of its loss. This suit seeks to recover a judgment for the amount of the loss. Plaintiff sold all the merchandise at a loss. To invoke the jurisdiction of this court, plaintiff must establish a breach of contract of sale. The terms of sale, abstracted from the penciled catalogue, stated, among other drastic provisions, as follows: "All property will be sold 'as is' at storage point, without warranty or guaranty as to quality, character, condition, size, color, weight, or kind, or that the same is in condition or fit to be used for the purpose for which it was originally intended or may be intended or desired to be used by the purchaser." Assuredly this was a sufficient warning to a prospective bidder that the Government was unwilling to assume any responsibility for the sale of the merchandise offered. The contract is replete with express reservations notifying the prospective purchaser that the sale was one wherein the Government offered the merchandise in its then present condition without the slightest intent of guaranteeing the goods in any respect whatever. The plaintiff was afforded complete opportunity to inspect and does not disavow knowledge of the terms of sale. Under the circumstances the court is left no other alternative than to dismiss the petition. The case falls within the decision of this court in *Triad Corporation* v. *United States*, 63 C. Cls. 151, and authorities therein cited.

The petition will be dismissed. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

BROADWAY SAVINGS TRUST CO. v. THE UNITED STATES

[No. H-300. Decided December 3, 1928]

On the Proofs

Income tax; debt charged off within taxable year; proof of ascertainment of worthlessness.—Where plaintiff claims the benefit of an exemption from taxation, the burden is upon him to show clearly that he comes within the exemption, and where a debt has been charged off within the taxable year merely upon the recommendation of a clearing house association and as a result of information obtained from sources familiar with the security charged off, without proof that the debt was ascertained to be worthless within the taxable year, the plaintiff is not entitled to deduction of the debt from his gross income.

The Reporter's statement of the case:

Mr. William D. Harris for the plaintiff. *Palmer, Davis & Scott* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is now and was in 1919 and 1920 a corporation organized under the laws of Missouri, conducting a banking business in the city of St. Louis. As such it filed an income-tax return for the year 1919 on March 1, 1920, showing a tax of $4,064.89, which was paid on March 8, 1920.

II. The Commissioner of Internal Revenue, upon reaudit of plaintiff's return and books, increased the net income from $25,281.66, as shown by its return for the year 1919, to $35,797.18, and by reason thereof found a deficiency in tax of $1,881.45 for said taxable year. The commissioner notified plaintiff of his determination of said deficiency by letter dated December 16, 1924.

III. Whereupon, on February 14, 1925, plaintiff filed an appeal before the Board of Tax Appeals, which said appeal

was duly heard and submitted to said board and by it decided on September 30, 1925, approving the determination of the commissioner. The findings of fact and decision of said board are as follows:

Appeal of BROADWAY SAVINGS TRUST COMPANY. Docket No. 2039. Submitted June 2, 1925. Decided Sept. 30, 1925.

Wm. D. Harris, Esq., for the taxpayer.

A. H. Murray, Esq., for the commissioner.

Before STERNHAGEN, LANSDON, GREEN, and LOVE

This appeal is from the determination of a deficiency in income and profits taxes for the year 1919 in the sum of $1,881.45, the commissioner having refused to allow as a deduction in that year the book value of a certain bond as a bad debt.

FINDINGS OF FACT

1. The taxpayer is a Missouri corporation with its principal place of business at St. Louis. At all times herein mentioned it was engaged in a general banking and trust business.

2. On or about the 19th day of November, 1912, the taxpayer in the course of its business purchased a bond or note of the Allegheny Improvement Company, of the face value of $10,000, for the sum of $9,500. On January 2, 1917, this bond was deposited with the Mercantile Trust Company of St. Louis, and a trust certificate of the face value of $10,000 was issued for the same, which certificate is now held by the taxpayer.

3. At the beginning of the year 1919 this trust certificate was carried on the books of the taxpayer at a depreciated value of $4,500. On recommendation of the Clearing House Association of St. Louis, the book value of this asset was further reduced in 1919 as follows: On January 22, to $4,000; July 26, to $3,000; August 26, to $2,000; and on December 17, 1919, it was entirely eliminated as an asset.

4. The original bond or note purchased by the taxpayer was one of a series issued by the Allegheny Improvement

Reporter's Statement of the Case

Company, with whom all the stock and bonds of the Missouri & North Arkansas Railroad were deposited as collateral. This came about as follows: The St. Louis & North Arkansas Railroad Company defaulted in interest on its bonds in 1906. The bondholders foreclosed and became the owners of the railroad properties. The Allegheny Improvement Company was organized to finance and construct extensions to this railroad and issued $6,000,000 collateral trust notes for that purpose. All the mileage constructed and to be constructed was pledged as collateral. The name of the St. Louis & North Arkansas Railroad was changed to Missouri & North Arkansas Railroad Company. The Allegheny Improvement Company defaulted the interest on the notes in 1909 and the principal on October 1, 1911. In the spring of 1912 the railroad company went into bankruptcy and thereafter was operated under a receivership. About the year 1916 the holders of the Allegheny Improvement Company notes foreclosed and purchased the stock and bonds of the railroad at a foreclosure sale. The former holders of the Allegheny Improvement Company's notes, including the taxpayer, became the owners pro rata of the stock and bonds of this railroad in the proportion that the face value of their notes bore to $6,000,000. The Mercantile Trust Company of St. Louis acted as trustee for the holders of these notes. The stock and bonds were deposited with this trust company and certificates evidencing beneficial interests were issued to the owners of the collateral trust notes of the Allegheny Improvement Company. The taxpayer thus became the owner of Certificate No. 53, having a face value of $10,000, which is the so-called bond involved in this appeal.

The railroad continuously lost money during the receivership. It became necessary to issue large amounts of receiver's certificates which had priority over all other securities. Such certificates were outstanding in the amount of more than $1,000,000 at the end of 1919, and in 1922 amounted to $1,970,000. In the year 1922 the holders of the receiver's certificates foreclosed and received only 71 cents on the dollar, leaving nothing for the holders of the other

securities. Since its organization the railroad has paid no interest on its bonds nor dividends on its stock.

5. Subsequent to the year 1919 the taxpayer, with others, filed suit against the directors of the Missouri & North Arkansas Railroad Company to recover on the certificate in question, but said suit resulted adversely to them in the year 1922.

6. In the year 1919 an examiner of the Clearing House Association, of which the taxpayer was a member, recommended that the trust certificate here in question be written off its books as a loss. The taxpayer investigated the value of this certificate by communicating with the receiver, the trustee, and other persons familiar with these securities, and, as a result of information so obtained, followed the recommendation of the Clearing House Association, and prior to the end of the year 1919 charged off its remaining book value as a worthless debt and deducted the same from its gross income for that year. The commissioner refused to allow this deduction as a loss for the year 1919. He determined a deficiency for the year 1919 in the sum of $1,881.45, and for the year 1920 an overassessment of $886.98, or a net additional tax of $994.47.

DECISION

The determination of the commissioner is approved.

ARUNDELL not participating.

IV. After the decision of said board an additional assessment was made against plaintiff in the sum of $1,881.45 for the year 1919, and plaintiff paid the collector of internal revenue at St. Louis, Missouri, under protest, on January 6, 1926, the sum of $1,004.41, and the commissioner applied a credit of $886.98, which was due it as an overassessment for the year 1920, against said assessment, making the total payment of $1,881.45, with interest of $9.94, in satisfaction of said additional assessment.

V. On or about March 19, 1926, plaintiff filed its claim for the refund of said $1,881.45, with the collector of internal revenue for the first district of Missouri at St. Louis, on Form 843.

VI. By letter dated July 19, 1926, addressed to plaintiff, the Commissioner of Internal Revenue rejected said claim.

VII. If the Commissioner of Internal Revenue had allowed as a deduction, as a bad debt, the cost to plaintiff of said bond, to wit, $9,500.00 for the year 1919, the net income would have been $26,297.18 for said year, which would have resulted in an excess-profits tax of $951.80, and a normal tax of $2,334.54, or a combined income and excess-profits tax of $3,286.34, which would have resulted in a refund of $778.55 of the original tax which was paid, and as plaintiff was required to, and did, pay the additional sum of $1,881.45 by applying as a credit for said year the sum of $886.98, and paying the sum of $994.47, exclusive of interest, the total amount of the refund would be $2,660.00, of which $1,881.45 is claimed in this suit.

If the Commissioner of Internal Revenue had allowed only the deduction of $4,500.00 for said year, the net income would have been $31,297.18, which would have resulted in an excess-profits tax of $1,951.80 and a normal tax of $2,734.54, or a combined income and excess-profits tax of $4,686.34, or a deficiency of $621.45 for 1919. As plaintiff paid by cash and credit the sum of $1,881.45, it would be entitled to a refund of $1,260.00.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff is a Missouri corporation engaged in a general banking and trust business at St. Louis. In 1912 it purchased a bond or note of the Allegheny Improvement Company, which owned all the stock of a certain railroad. This bond had a face value of $10,000, for which plaintiff paid $9,500.

In 1916 the holders of the bonds or notes of the Allegheny Improvement Company foreclosed and reduced their claims to judgment, and also purchased the stock and bonds of the railroad, and became the pro rata owners thereof.

The stock of the railroad was deposited with a trust company which issued trust certificates to the holders showing their respective interests. In this manner plaintiff became

the owner of certificate No. 53, having a face value of $10,000, which is the so-called bond involved in this case.

At the beginning of the year 1919 the certificate was carried on the books of plaintiff at a depreciated value of $4,500.

The receivership of the railroad continuously lost money. Accordingly it became necessary to issue receiver's certificates, which had priority over all other securities. At the end of 1919, $1,000,000 in amount of receiver's certificates were outstanding, and in 1922 these receiver's certificates outstanding amounted to $1,970,000. In the year 1922 the holders of receiver's certificates foreclosed and received only 71 cents on the dollar, leaving nothing to the holders of the other securities.

After the year 1919 the plaintiff, with others, filed suit against the directors of the Missouri & North Arkansas Railroad Company to recover on the certificate in question, but said suit resulted adversely to them in the year 1922.

In the year 1919 the plaintiff charged off the certificate in question as a worthless debt, and deducted the same from its gross income for that year. The commissioner refused to allow this deduction as a loss for the year 1919. The plaintiff filed an appeal before the Board of Tax Appeals, which approved the determination of the commissioner.

The question herein is whether the debt involved was ascertained to be worthless, as contemplated by the following provisions of the revenue act of 1918, 40 Stat. 1057:

"SEC. 234. (a). That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions: * * *

"(5) Debts ascertained to be worthless and charged off within the taxable year."

In the case of *The Edith*, 94 U. S. 518, 522, referring to special privileges given by statute, the court said:

"The lien during those ten days was a special privilege given to them by statute—an exceptional right. Hence, it was incumbent upon them to show that such a right

existed, and, by proof, to bring themselves within the exception. This is always the rule when a party claims a peculiar right given by a statute—a right not common to all, and which is given only when a prescribed state of facts shall exist."

In the case of *New York Trust Co.* v. *United States*, 63 C. Cls. 100, this court announced a similar doctrine, when it said:

"Plaintiff is claiming the benefit of an exemption from taxation, and the burden is upon it to show clearly that it is within the exemption claimed." (Citing cases.)

In *Georgetown Grocery Co.* v. *United States*, 63 C. Cls. 160, referring to the same section of the revenue act of 1918, involved herein, this court said:

"Under this statute, to entitle plaintiff to the deduction claimed it is necessary that it should satisfactorily show that this debt, at the time of the filing of its tax return on March 15, 1921, had been 'ascertained to be worthless and charged off within the taxable year,' i. e., 1920."

Measured by the rules announced in the above cases, we must conclude that plaintiff has not shown that the debt involved herein was ascertained to be worthless in the year 1919, as contemplated by sec. 234 (a) (5) of the revenue act of 1918.

It is stipulated that the debt was charged off as a worthless debt in the year 1919, but it nowhere appears in the record, or in the stipulations, that the debt was ascertained in 1919 to be worthless.

Two factors must be present to entitle plaintiff, under the statute, to the deduction claimed:

1. The debt must be ascertained to be worthless within the taxable year.
2. The debt must be charged off within that year.

It is not disputed that the $4,500 was charged off within the taxable year; but unless we are to indulge in unwarranted inference, presumption, and conjecture favorable to plaintiff, we must conclude that the facts, as stipulated, fail to show an ascertainment of the worthlessness of the debt, tested by the rules laid down in the cases above cited.

It appears in the stipulation that in 1919 an examiner of the Clearing House Association "recommended that the trust certificate here in question be written off its books as a loss."

We are left to conjecture as to what rules or standard guided the examiner. As to this the record is silent. We are left to conjecture whether the recommendation was actuated by prudent banking practices or by his ascertainment of the worthlessness of the debt. Surely, in the absence of evidence as to the standard followed by the examiner in making his recommendation, we can not indulge in the presumption that it was due to his "ascertainment" of the worthlessness of the debt.

It is stipulated that plaintiff investigated the value of this certificate by communicating with the receiver, the trustee, and other persons familiar with these securities, and, as a result of information so obtained, followed the recommendation of the examiner, and charged off the debt as a worthless debt; but from this stipulation we find no proof of the ascertainment of the worthlessness of the debt, as contemplated by statute, unless we are to indulge in the inference that, because the debt was charged off as worthless, such ascertainment was made.

The failure of the stipulations, except by inference, to show an ascertainment of the worthlessness of the debt, leaves the stipulation pregnant with the implication that no such ascertainment was found. This view is strengthened by the suit filed after the year 1919 to recover on the certificate in question, and which resulted adversely in the year 1922.

We are of the opinion that the deduction should be denied. The petition will be dismissed. It is so ordered and adjudged.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE TRUST CREATED BY THE LAST WILL AND TESTAMENT OF WILLIAM C. LANGLEY, DECEASED, v. THE UNITED STATES

[No. D-882. Decided December 3, 1928]

On the Proofs

Jurisdiction; interest allowed by another court; appropriation by Congress.—Where Congress has made an appropriation to pay interest as specified in the judgment of a court, claim for such interest is founded upon a law of Congress, section 145, Judicial Code, and cognizable by the Court of Claims, notwithstanding the judgment was rendered in another court, and on a cause of action over which the Court of Claims did not have jurisdiction.

Same; interest allowed in judgment of the Court of Claims.—In giving judgment for the interest so specified and appropriated for down to the date of its own judgment, the Court of Claims is not allowing interest on a claim.

Same; res adjudicata.—The award of interest by the court rendering the original judgment is *res adjudicata*, and the Court of Claims can not review such decision.

Estoppel; acceptance of accounting officer's settlement; reservation of right to sue.—Notice by the Comptroller General to a claimant that if he desired a review of the settlement "he should not accept payment of the amount allowed as to such item, and that the check inclosed should not be cashed if its amount includes any item as to which review is applied for," does not preclude the claimant from suing for the balance alleged to be due, when in cashing the check he advises the Comptroller General that the sum tendered is accepted in part payment only and that the right to claim the remainder is reserved.

The Reporter's statement of the case:

Mr. Royal E. T. Riggs for the plaintiff.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. On the 5th day of January, 1921, plaintiff recovered judgment in the United States District Court for the East-

ern District of New York in the sum of $2,439,495.47 against the United States of America.

II. Thereafter the said cause was reviewed upon writs of error obtained by the United States of America and the city of New York in the United States Circuit Court of Appeals for the Second Circuit. On or about January 31, 1922, the said court entered a judgment affirming the said judgment of the district court and thereafter, pursuant to the mandate of the said United States Circuit Court of Appeals, a judgment was duly entered in the United States District Court for the Eastern District of New York by which it was adjudged that the plaintiff recover of the United States of America the sum of $2,439,495.47, with interest thereon at 6 per cent per annum from January 5, 1921.

III. Thereafter by writ of error the said cause was reviewed by the Supreme Court of the United States, which affirmed the said judgment of the United States Circuit Court of Appeals; and, pursuant to the mandate of the United States Supreme Court, a judgment was entered in the said United States District Court for the Eastern District of New York on the 16th day of April, 1923, by which it was adjudged that the plaintiff recover of the United States of America the sum of $2,439,495.47, with interest thereon from January 5, 1921, at 6 per cent per annum.

IV. Thereafter in the appropriation act, Public No. 66, 68th Congress, appropriation was made for the payment of certain judgments, including the said judgment obtained by plaintiff in the sum of $2,439,495.47, "together with such additional sum as may be necessary to pay interest thereon at the legal rate per annum as and where specified in said judgments."

V. On or about May 23, 1924, plaintiff demanded of the United States of America the payment of the said judgment which was obtained April 16, 1923, with interest thereon from January 5, 1921, at 6 per cent per annum until date of payment.

VI. Thereafter certified transcripts of the judgment of April 16, 1923, were presented to the General Accounting Office as required by the act of February 18, 1904, 33 Stat. 41, for payment, and the Comptroller General on April 25, 1924, issued a "notice of settlement" in favor of plaintiff for the net sum of $2,649,404.45, which was paid to plaintiff by Treasury check dated May 24, 1924. This notice shows that in his calculation of the said net amount the Comptroller General allowed 6 per cent interest on the principal sum of $2,439,495.47 from January 5, 1921, to April 16, 1923; 4 per cent interest from April 16, 1923, to April 2, 1924, date of the appropriation; and from and after April 2, 1924, no interest. There was attached to this "notice of settlement" a "note," which stated, among other things, that: "The inclosed check should not be cashed if its amount includes any item as to which review is applied for, but unindorsed should accompany the application for review."

VII. Prior to or simultaneously with the payment of the said warrant for $2,649,404.45 the plaintiff sent a letter to the Comptroller General with reference to the case, in which he stated that he had received the statement of settlement and warrant referred to in the previous finding and renewed his claim that there was due the full amount of the judgment obtained against the United States with interest as adjudged therein. The letter also contained the following statement:

"I regard this warrant as a payment on account of said judgment, and that in endorsing and cashing this warrant, I take the sum as a payment on account of said judgment and not as payment in full thereof, and reserve all my rights to claim the remaining amount of interest due from the United States."

VIII. If plaintiff is entitled to interest on the principal sum of $2,439,495.47 at the rate of six per cent per annum from January 5, 1921, to May 24, 1924, the amount of interest unpaid and remaining due plaintiff is $62,142.34, at the date last mentioned.

The court decided that plaintiff was entitled to recover.

Opinion of the Court

GREEN, *Judge*, delivered the opinion of the court:

On the original submission of this case the court was of the opinion that it would not come within the jurisdiction of this court as provided by law, but a further consideration has led the court to the conclusion that the plaintiff has a claim upon which suit may be brought in this court.

The case is a peculiar one. No further or additional relief than that granted in the original judgment is asked. Indeed, it would seem that any judgment entered by this court would not provide the same remedies in the way of enforcement or continue the running of interest after the new judgment had been entered. That portion of the statutes conferring jurisdiction upon this court which is material to the determination of this case provides that—

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims * * * founded upon * * * any law of Congress, * * * upon any contract, express or implied, with the Government of the United States, * * * in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." (Judicial Code, sec. 145.)

and the plaintiff must bring himself within these provisions in order to give the court jurisdiction.

The plaintiff in this case recovered judgment, on January 5, 1921, against the United States in the United States District Court for the Eastern District of New York for the value of property appropriated by the United States under what is commonly known as the Lever Act.

This judgment was reviewed by the United States Circuit Court of Appeals, and its judgment in turn was reviewed by the United States Supreme Court with the result that the judgments of the lower courts were affirmed and a final judgment entered in the said district court in favor of the plaintiff for $2,439,495.47, with interest thereon from January 5, 1921, at 6 per cent per annum. A transcript of the judgment having been duly presented in the manner required by law, the Comptroller General issued a notice of settlement in favor of the plaintiff for the net sum of

$2,649,404.45, which was paid to the plaintiff by Treasury check dated May 24, 1924. An examination of this notice shows that the Comptroller General, in calculating the amount due, allowed 6 per cent interest on the principal sum of $2,439,495.47 from January 5, 1921, to April 16, 1923, 4 per cent interest from April 16, 1923, to April 2, 1924, date of the appropriation, and from and after April 2, 1924, no interest. The plaintiff brings this suit to recover the balance of interest unpaid in accordance with the final judgment upon his claim.

The courts of several of the States have held in substance that an action may not be maintained upon a judgment where the new judgment would give no other or further relief than that provided by the original judgment, but the rule in most States is otherwise. The precise question involved in the case does not seem to have been directly decided by the Supreme Court or by lower Federal courts, but upon consideration of the former decisions of this court and of the Supreme Court when any of such cases were reviewed, it would seem that by inference at least the jurisdiction of this court over the case at bar can be sustained, although the facts in none of these cases were exactly similar to those in the case now before this court.

The first case ever considered by this court was that of *Brown* v. *United States*, 6 C. Cls. 171. This case was brought upon a judgment originally rendered in the Court of Claims under the abandoned or captured property act, by which it was adjudged that the plaintiff was entitled to a certain fund held by the Government, amounting to $9,904.44. The Secretary of the Treasury withheld and refused to pay over to the plaintiff part of this fund and suit was brought to recover the balance unpaid. In a very long and elaborate opinion the majority of the court held that the action was within its jurisdiction and might be maintained. Two dissenting opinions were filed.

The next case considered by this court was that of *O'Grady* v. *United States*, 8 C. Cls. 451. This was another case based on a judgment rendered in favor of the plaintiff under the abandoned or captured property act in the Court of Claims,

but the Secretary of the Treasury refused to pay the same without making a certain deduction. This deduction was submitted to under protest and an agreement made that the rights of the parties were reserved subject to the decision of the Supreme Court. The suit was brought to recover the unpaid balance of the judgment. It was held that the Secretary of the Treasury had no right to make the deduction and judgment was rendered in favor of the plaintiff for the unpaid balance. Upon an appeal to the Supreme Court the decision was affirmed in *United States* v. *O'Grady*, 22 Wall. 641, no question being raised as to the jurisdiction of this court in the suit brought upon the judgment.

In *Bonnafon's* and *Norton's cases*, 14 C. Cls. 484, it appeared that the Secretary of the Treasury had again refused to pay in full judgments rendered by this court, and in each case, suit being brought on the original judgment, this court said:

"It has been determined by this court and by the Supreme Court that actions on such judgments may be maintained."

Judgment was accordingly entered in favor of Norton for the unpaid balance on the judgment first rendered by this court. In *Bonnafon's case* the court found that he had accepted the amount paid by the Secretary of the Treasury in full for the settlement of his judgment. No appeal was taken in these cases.

In *United States* v. *Weld*, 127 U. S. 51, it appeared that suit had been brought in this court to recover the unsatisfied portion of a judgment recovered in the Court of Commissioners of Alabama Claims, which, it was alleged, had been illegally withheld by the Secretary of the Treasury and the accounting officers of the department. Judgment was rendered in this court for the unsatisfied balance of the prior judgment and on appeal to the Supreme Court the decision of the Court of Claims was affirmed.

In the case last cited the jurisdiction of the Court of Claims was attacked, but on a different ground from any which arises in this case. It was said that the action was one growing out of and dependent upon a treaty, and that therefore this court had no jurisdiction thereof under the

provisions of section 1066, Revised Statutes. This contention was overruled, and in passing upon this point the Supreme Court said:

"The claimant in this case does not seek to recover upon any supposed obligation created by the treaty of Washington, but upon the specific appropriation made in the act of June 2, 1886. It is under this act that a means of satisfaction of this claim was provided. The claim may, therefore, be said to be 'founded upon a law of Congress' within the meaning of section 1059, Revised Statutes, and therefore clearly one of which the Court of Claims could take jurisdiction."

The principle set out in this statement of the Supreme Court runs through all of the cases cited. In none of them except *Bonnafon's* and *Norton's cases*, in which no appeal was taken, does it definitely appear from the opinion rendered whether the original judgment upon which suit was brought was entered directly against the United States, but in all of them the record shows that the claim for relief was "founded upon a law of Congress," and that the defendant, the United States, had in its possession in the hands of the Secretary of the Treasury a fund which by law had been set aside for its payment.

In the case at bar, in addition to the facts stated in the stipulation, the court will take judicial notice that a specific appropriation was made by the act approved April 2, 1924 (Public No. 66, 68th Cong.), to pay the judgment upon which suit is brought, and certain other judgments, "together with such additional sums as may be necessary to pay interest thereon at the legal rate per annum as and where specified in said judgments."

It thus appears that there was a special fund set aside by Congress for the payment of this judgment, together with interest according to its terms. This appropriation was pleaded in plaintiff's petition. In the language of *United States* v. *Weld*, *supra*, "the claim may, therefore, be said to be 'founded upon a law of Congress,'" and we conclude that the action now before this court may be maintained.

In so holding we do not overlook the point made on behalf of the Government that this court did not have jurisdiction of the original cause of action, which resulted in the judg-

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ment upon which this case is based. A similar argument was made in the case of *United States* v. *Weld*, *supra*. In that case suit was brought on a judgment rendered by another tribunal in a cause over which this court had no jurisdiction. The decision therein is sufficient authority for overruling the contention of the defendant on this point.

It is contended on behalf of the defendant that interest does not run against the Government except in those cases specifically excepted by statute or express stipulation, and, in support of this contention, the case of *Angarica* v. *Bayard*, 127 U. S. 251, is cited. But if the plaintiff is found entitled to recover in this case interest up to the time when judgment is rendered herein, this court is not awarding interest to the plaintiff. That was done by the Federal courts which entered judgment in his favor with interest from a date specified. This total amount, which must be computed by including interest up to the date of the judgment, is the claim of the plaintiff, but we are precluded by statute from providing that the judgment which we enter shall draw interest, or, in other words, allowing the plaintiff interest upon his claim.

Nor can we consider whether plaintiff, on the merits of the case, was entitled to the interest which the Federal courts awarded him. This matter is *res adjudicata* and neither the Comptroller General nor this court has any authority to review the decision. We think the case of *Angarica* v. *Bayard*, *supra*, is not applicable. There the plaintiff was asking for interest upon his claim against the Government. Here the plaintiff's claim includes interest to which another court has adjudged he is entitled. In the *Angarica case* a duly authorized commission made an award in favor of the plaintiff and against the Spanish Government for a certain sum with interest until paid, the payment to be made to the United States for the use of the plaintiff. The Spanish Government paid the amount of the award with interest as therein provided to our Government to be turned over to the plaintiff. This amount, the Supreme Court held, was the claim of the plaintiff against the United States, and it refused to allow interest thereon. In the *Angarica case*, the judgment providing for the interest was rendered against

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Spain; in the case at bar, the judgment providing for the interest was rendered against the United States.

The defendant also urges that the plaintiff is estopped to maintain this action by reason of a notice that was attached to the statement of settlement made by the Comptroller General and which statement and notice accompanied the check which was subsequently cashed by the plaintiff. This notice or "note," as it was marked, was to the effect that if the plaintiff desired a review of the settlement "he should not accept payment of the amount allowed as to such item" and that the check inclosed "should not be cashed if its amount includes any item as to which review is applied for."

It is questionable whether the check cashed included "any item as to which review is applied for," but conceding for the sake of the argument that it did, it should be observed that simultaneously with receiving the notice of settlement of claim with the "note" attached, together with the check which was subsequently cashed, the plaintiff sent a letter to the Comptroller General in which he renewed his claim for the full amount of the judgment, and stated in substance that he regarded the warrant as a payment on account of the judgment, and that in cashing the warrant he took the sum in payment on account of the judgment and not as payment in full thereof, and that he reserved all his rights to claim the remaining amount of interest due under the judgment.

Under these circumstances, we do not think the plaintiff was estopped to demand and receive the unpaid portion of the judgment. Plaintiff was obliged to accept the warrant and cash it, otherwise he would get nothing on his judgment. It seems to us that it would be inequitable to permit a judgment debtor to claim that the judgment creditor was estopped because he had received and cashed a check for part of the judgment, when the debtor at the time of the payment had told the creditor in effect that if he did not accept the check in full he would get nothing. But the plaintiff's defense to this claim goes further: At the time of receiving the check he notified the defendant that he did not receive it in full payment of his claim on the judgment. We think the elements of estoppel are lacking and that the cashing of

the check, under the circumstances, is not a bar to plaintiff's maintaining this action. It follows that the plaintiff is entitled to recover, but some questions arise as to the amount of his recovery.

The petition recites that the plaintiff has assigned $162,240 of his judgment with interest thereon from April 6, 1918, to the city of New York, and the stipulation shows that both plaintiff and defendant in arriving at the amount due have undertaken to make appropriate deduction on account of this assignment in determining the amount due the plaintiff. The stipulation also recites that if plaintiff is entitled to recover interest at the rate of 6 per cent per annum from January 5, 1921, to May 21, 1924, on the principal sum of $2,439,495.47, "the *amount to be due* is $62,142.34." The date, May 21, 1924, is evidently used through mutual mistake by the parties to the action instead of May 24, 1924, which is the date when the check was issued and received from the comptroller. For reasons hereinafter stated, it is not material which date is used. A more serious question arises by reason of the failure of the stipulation to state definitely when this amount was due, but we think the statement quoted from the stipulation means that the amount last mentioned was due at the end of the period for which computation was made of the interest as stated in the stipulation. As we find that there was at least $62,142.34 due whichever date is used, the error, if there be one, is immaterial. Upon the sum thus agreed to, we think the plaintiff is entitled to interest at 6 per cent from May 24, 1924, up to the time judgment is entered herein, as provided in the original judgment upon which suit is brought.

The petition asks judgment for $63,770.78, with interest from the 24th day of May, 1924, but we think we are precluded by the stipulation from entering judgment for anything more than for the amount provided therein with interest. It is therefore ordered that judgment be entered in favor of the plaintiff for $62,142.34, with interest at 6 per cent per annum from May 24, 1924, to the date of judgment.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

C. B. FOX COMPANY v. THE UNITED STATES[1]

[No. F-336. Decided December 3, 1928]

On the Proofs

Income and profits taxes; sec. 209, act of October 3, 1917; nominal capital.—Where the type of business conducted "necessarily and customarily requires capital for its operation," the amount of such capital is substantial, and the income is in direct proportion thereto, a corporation is not entitled to the benefit of section 209 of the act of October 3, 1917, providing for the special assessment of corporations employing "not more than a nominal capital."

The Reporter's statement of the case:

Mr. Ben Jenkins for the plaintiff. *Wallick & Shorb* were on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff at all times hereinafter mentioned was and is now a domestic corporation organized under and by virtue of the laws of the State of Louisiana and engaged in the grain-exporting business, having its principal office in the city of New Orleans, parish of Orleans, in the said State of Louisiana.

II. Within the time prescribed by the revenue act in force, and upon the forms prescribed, plaintiff made and filed its income and profits tax return for the fiscal year ended June 30, 1917, indicating a tax due of $74,085.00, which said amount was paid in the amounts on the dates as follows, viz.:

December 11, 1917	$4,827.22
December 11, 1917	9,134.44
May 31, 1918	60,123.34

In the month of March, 1923, there was assessed against the plaintiff an additional tax of $70.52 for the said fiscal year ended June 30, 1917, which amount was paid on March

[1] Certiorari denied.

31, 1923, making the total sum of income and profits taxes for the fiscal year ended June 30, 1917, assessed against plaintiff and paid by it $74,155.52, of which the sum of $17,388.58 was refunded, as hereinafter set out.

III. Pursuant to the provisions of the revenue act of 1924, 43 Stat. 253, the plaintiff filed upon the prescribed form and within the time prescribed by sec. 281 (e) of that act a waiver for the taxable year 1917.

IV. On October 13, 1924, plaintiff filed in the office of the collector of internal revenue for the district of Louisiana at New Orleans claim for the refund of $74,085 (or such greater amount as is legally refundable) of the moneys collected by it as aforesaid, stating that "detailed information is being filed direct in Washington to show that the above amount should be refundable."

On the 13th day of November, 1925, the Commissioner of Internal Revenue advised the plaintiff by letter that its application for consideration under section 210 of the revenue act of 1917 had been allowed and that upon a recomputation the correct tax liability for the fiscal year ending June 30, 1917, had been determined to be $56,766.94, and that therefore the aforesaid claim for refund of $74,085 would be rejected for $56,696.42. Pursuant to the terms of said letter a refund of $17,388.58 was made by the Commissioner of Internal Revenue and received by the plaintiff.

V. On or about March 20, 1925, plaintiff filed in the office of the collector at New Orleans a second claim for the refund of $74,085 (or such greater amount as is legally refundable), which claim was based upon the ground "that the taxes of this corporation [plaintiff] for the year in question [fiscal year ending June 30, 1917] should have been computed in accordance with the provisions of section 209 of the act of October 3, 1917, due to the fact that only a nominal capital was invested in the business."

On the 10th day of September, 1926, the Commissioner of Internal Revenue advised the plaintiff that the said claim had been rejected for the reason that its capital was not nominal or negligible.

VI. On the 4th day of December, 1925, the plaintiff protested by letter the correctness of the method used by the

commissioner in his computation of the excess-profits tax liability of the plaintiff at the four per cent rate.

VII. On the 8th day of January, 1926, the commissioner by letter affirmed the correctness of the computation of the four per cent tax made in the letter of November 13, 1925.

VIII. The plaintiff company had $100,000 of capital stock, all of which was paid in and being used in the business. In addition, the company borrowed large sums of money with which it carried on its business. The money was borrowed from banks and the notes were indorsed by C. B. Fox, the president, individually, and bills of lading covering purchased grain were used as collateral security.

IX. In computing the additional 4 per cent tax for the 6 months of the fiscal year 1917 falling within the calendar year 1917 the excess-profits tax should be deducted from six-twelfths of the income for the fiscal year, and the 4 per cent tax computed on the remainder.

The court decided that plaintiff was entitled to recover in part only.

Moss, *Judge*, delivered the opinion of the court:

Plaintiff, C. B. Fox Company, Inc., organized in 1915, was engaged in buying and exporting grain. C. B. Fox, prior to such organization and since 1894, had been engaged in the same business. The corporation had a capital stock of $100,000, all paid in, ninety-eight per cent of which was owned by C. B. Fox. For the fiscal year ending June 30, 1917, plaintiff filed its income and excess-profits tax returns, showing a net income of $244,230.27. The Commissioner of Internal Revenue assessed a total tax liability against plaintiff of $74,155.52, which was paid. The excess-profits tax was assessed under section 201 of the revenue act of 1917, 40 Stat. 303. On October 11, 1924, plaintiff applied for a refund of said tax, claiming that it was entitled to the benefit of section 210 of the act of 1917, known as the "special assessment section," 40 Stat. 307. Plaintiff was advised by letter dated November 13, 1925, that its application had been allowed, and that upon a recomputation the correct tax had been determined to be $56,766.94. Prior to this

date, however, to wit, on March 20, 1925, plaintiff filed its second application for refund, in which it was specifically stated: "Claim is made that the taxes of this corporation for the year in question should have been computed in accordance with the provisions of section 209 of the act of October 3, 1917, due to the fact that only a nominal capital was invested in the business." This claim was rejected.

It is plaintiff's contention in this action that its invested capital of $100,000 was not more than a *nominal capital*, and that its excess-profits tax should have been assessed under said section 209, 40 Stat. 307. If plaintiff's theory is correct, it is entitled to recover $37,927.47.

Under section 201 of the act of 1917, which relates to the excess-profits tax, the tax is based on the relation between the net income and the invested capital, according to a graduated scale of percentages set forth in the act itself. Section 209 of said act imposes a tax on a trade or business having no invested capital or not more than a nominal capital. It is in the following language: "That in the case of a trade or business having no invested capital or not more than a nominal capital there shall be levied, assessed, collected, and paid, in addition to the taxes under existing law and under this act, in lieu of the tax imposed by section 201, a tax equivalent to eight per centum of the net income of such trade or business in excess of the following deductions: * * *." The rates provided in section 201 range from 20 per cent to 60 per cent of the amount of the net income. It was the method provided by Congress for measuring the excess-profits tax of a corporation operating on an invested capital; and the scale of percentages was graduated to meet the varying conditions as to the amount of such invested capital. In the enactment of section 209 relating to a trade or business not operating on capital invested, or whose capital was merely nominal, Congress was compelled to resort to a wholly different method for the measurement of such tax, and this was accomplished by the allowance of certain substantial arbitrary deductions and the adoption of a purely arbitrary rate of 8 per centum of the net income. The purpose in both instances was to provide a proper measure or rate

to be applied to the net income in computing the tax. In the case under consideration the income was produced by the use of capital. In addition to the $100,000 paid-in capital, the corporation borrowed monthly an average amount of more than $900,000 on the personal endorsement of C. B. Fox, the grain bills of lading being also pledged as security. The gross sales for the year in question amounted to more than $12,000,000, and the net income to $244,230.27. Is it a reasonable contention that because plaintiff's transactions for the year in question were out of proportion to the amount of the invested capital, $100,000, such capital should be regarded as nominal or negligible? If plaintiff's contention is sound, then an invested capital of, say, $500,000, in a business which resulted in proportionately larger gross sales and a proportionately greater net income, could likewise be treated as nominal capital. It is shown by the evidence that in plaintiff's business the income or profits are in direct proportion to the amount of capital employed, which in this case amounted to several hundred thousand dollars, one hundred thousand of which was paid in, and the remainder borrowed money.

Article 74 of the Treasury Regulations promulgated for administering the excess-profits tax defined a trade or business coming within the provisions of section 209 as follows:

"* * * The term 'nominal capital' as used in section 209 means in general a small or negligible capital whose use in a particular trade or business is incidental. The following will not be construed as business having a nominal capital for purposes of excess-profits tax.

"(a) A business which because of conditions arising from the war or exceptional opportunities for profits earns a disproportionately high rate of profits during the taxable year, *if it belongs to a class which necessarily and customarily requires capital for its operation.*

"(b) Corporations which, although their capitalization is *nominal* employ a *substantial amount* of *capital* in their business." (Our italics.)

It can not be questioned that plaintiff conducted a type of business which "necessarily and customarily requires capital for its operation," and, further, there was employed

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in the business not only a *substantial* amount of capital but a very large amount.

At plaintiff's own request and on its own application the Commissioner of Internal Revenue, doubtless recognizing the excessive burden resulting from the computation of the tax on the basis of the relation between net income and *invested* capital, allowed plaintiff the benefit of section 210 by giving due consideration to the rates applied to representative companies in the same business. We are only concerned, however, with plaintiff's present contention that its invested capital of $100,000 was not more than a nominal capital within the meaning of the statute, and for reasons herein indicated we are unable to sustain that contention.

It is admitted that plaintiff is entitled to recover the sum of $979.12 due to an error in computation. Judgment will be entered for that amount.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JOSIAH OGDEN HOFFMAN v. THE UNITED STATES

[No. H-297. Decided December 3, 1928]

On the Proofs

Relief act, March 3, 1927; resignation of Navy officer; subsequent commission and retirement; retired pay; longevity.—An officer of the Navy, whose resignation was accepted July 28, 1923, was thereafter, on March 17, 1927, in pursuance of the relief act of March 3, 1927, and after compliance with its provisions, commissioned as a lieutenant commander and immediately retired. *Held,* (1) that he was not entitled to retired pay prior to his commission, and (2) under the act of June 10, 1922, by resigning in 1923, he surrendered his right to count previous service while a midshipman in computing longevity pay, and being an officer appointed after July 1, 1922, was entitled to count active commissioned service only.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. M. C. Masterson* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, Josiah Ogden Hoffman, entered the Navy June 29, 1906, as a midshipman at the Naval Academy and after completing the course was commissioned an ensign, U. S. Navy, to date from March 7, 1912, under act of that date (37 Stat. 73). The plaintiff was commissioned a lieutenant, junior grade, at the expiration of three years' service as ensign from March 7, 1915, and so served until July 1, 1917, when he was commissioned a lieutenant and served in that grade until July 1, 1918, when he was commissioned a lieutenant commander and continued to serve as such until July 28, 1923, when his resignation was accepted.

II. March 3, 1927, on representation made to Congress that plaintiff had incurred disability in the line of duty the act of March 3, 1927, was passed for his relief. A copy of the act is attached to petition as Exhibit A, and made a part hereof by reference thereto.

Thereupon the plaintiff was, on March 17, 1927, commissioned a lieutenant commander to rank from March 3, 1927, and the President issued to plaintiff a commission, a copy of which is attached to petition as Exhibit B and made a part hereof by reference thereto. The plaintiff accepted the appointment and executed oath of office on March 17, 1927, and on the same date he was placed on the retired list with the rank of lieutenant commander from March 3, 1927.

III. The plaintiff has been paid from March 17, 1927, as a lieutenant commander, retired, with over nine and less than twelve years' service, which is the amount of his active service between date of his commission in the Navy and that

of his resignation, being at the rate of $172.50 a month, or $2,070 a year.

If paid as a lieutenant commander, retired, of over fifteen and less than eighteen years' service from March 17, 1927, which would be his length of service counting service as a midshipman at the Naval Academy and previous to his original commission as ensign, he would receive pay at the rate of $234.37 a month, or $2,812.50 a year. The difference would be $61.87 a month, amounting to December 31, 1927, to $585.70.

If entitled to additional retired pay from March 3, 1927, to March 16, 1927, based on commissioned service only, there would be due $80.50, representing fourteen days at $172.50 per month.

If entitled to additional retired pay from March 3, 1927, to March 16, 1927, based on combined service at the Naval Academy and commissioned service, there would be due plaintiff $109.37, fourteen days at $234.37 per month.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

Plaintiff graduated from the Naval Academy on June 3, 1910, was commissioned an ensign as of March 7, 1912, and thereafter served continuously in successive grades in the Navy until July 28, 1923, when he voluntarily resigned therefrom, being at the time a lieutenant commander. On March 3, 1927, on representations made to Congress that plaintiff had incurred disability in the line of duty, the act of March 3, 1927, set forth in petition, was passed for his relief. This act authorized the President to appoint plaintiff a lieutenant commander in the United States Navy and place him upon the retired list of the Navy with the pay and allowance of that grade, provided a duly constituted naval retiring board should find that he incurred physical disability incident to active service in line of duty, and also provided that no back pay, allowances, or emoluments should become due as a result of the passage of the act. The board examined plaintiff and filed its report on March 10, finding

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that he was incapacitated for active duty and that his incapacity was the result of physical injury incident to active service in the line of duty. On recommendation of the Bureau of Medicine and Surgery, the President on March 16, 1927, issued the following order:

"The proceedings and findings of the Naval Retiring Board in this case are approved, and Mr. Josiah O. Hoffman will be appointed a lieutenant commander in the Navy and placed on the retired list of the Navy with the pay and allowances of that grade, in accordance with the provisions of U. S. Code, title 24, section 417 (R. S. 1453), and those of the act of March 3, 1927."

The President thereupon issued a commission to the plaintiff as lieutenant commander and he was immediately retired, and has been paid as a lieutenant commander retired since March 17, 1927. He is claiming pay from March 3, 1927, the date of the passage of the act, to his appointment. It is clear that he could only receive this appointment after an examination by the board, a favorable recommendation to the President, and action by the latter on the report. This action was not taken until March 16th and the appointment dated from the 17th, on which date he accepted the same, executed the oath of office, and was placed on the retired list. Therefore he can not recover for pay from the 3d to the 17th of March.

The plaintiff is also claiming increase in longevity pay by counting his service as midshipman at the Naval Academy from 1906 to 1912. The applicable statute is the act of June 10, 1922, 42 Stat. 627:

"For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay, * * *."

If the plaintiff comes within the first clause of this provision, he can not recover; if he comes within the latter clause, he is entitled to the amount claimed in this action.

We do not think he comes within the latter clause. See *Cronin* v. *United States*, 62 C. Cls. 20, and *Guilmette* v. *United States*, 49 C. Cls. 188. Under the authority of these cases, the plaintiff by his resignation of July 28, 1923, surrendered whatever right he had to count his service while a midshipman, and being an officer appointed after July 1, 1922, he is only entitled under the act to count active commissioned service for longevity-pay purposes.

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge; and* BOOTH, *Chief Justice*, concur.

WARD BAKING CORPORATION v. THE UNITED STATES

[No. H-66. Decided December 3, 1928]

On the Proofs

Excise tax; "carrying on or doing business"; holding corporation; management of subsidiary.—When a corporation is actively engaged in expanding the trade and increasing the assets and dividends of a corporation whose stock it holds as its sole asset, by assuming management and control of the subsidiary, it is engaged in business and not entitled to exemption from the excise tax imposed by section 700 (a) (1) of the revenue act of 1924.

The Reporter's statement of the case:

Mr. Ewing Everett for the plaintiff. *Messrs. Robert N. Miller, Stuart Chevalier* and *Arthur N. Colton*, and *Miller & Chevalier* were on the brief.

Mr. Dwight E. Rorer, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized on December 27, 1923, under the laws of the State of Maryland.

II. The plaintiff duly filed its Federal capital-stock tax returns for the taxable periods July 1, 1924, to June 30, 1925, and July 1, 1925, to June 30, 1926, said returns containing the statement that the plaintiff claimed exemption on the ground that it was not carrying on or doing business within the meaning of sec. 700 (a) (1) of the revenue act of 1924.

III. On April 24, 1926, the commissioner proposed a capital-stock tax of $28,041 for the taxable period July 1, 1924, to June 30, 1925, and a tax of $31,044 for the taxable period July 1, 1925, to June 30, 1926.

On or about May 24, 1926, plaintiff received a notice demanding the payment of the sums of $28,041 and $31,044, representing the capital-stock tax proposed as aforesaid, and on June 2, 1926, plaintiff paid said sums under protest to the United States collector of internal revenue.

On June 15, 1926, plaintiff filed its claims for refund of the aforesaid sums and on August 13, 1926, such claims for refund were rejected by the Commissioner of Internal Revenue.

IV. On or about November 15, 1923, George S. Ward, president of the Ward Baking Company, a corporation then actively engaged in the manufacture and sale of baking products, on behalf of the directors and stockholders representing more than 51% of the stock of the Ward Baking Company, offered to sell the control of that company.

In response to this offer, proposals were received from the General Baking Company and from William B. Ward, individually.

The proposal of the said William B. Ward to the president of the Ward Baking Company was dated December 6, 1923, with conditions of the offer set forth therein. The letter is attached to the petition herein as Exhibit "A," and is made a part hereof by reference.

On December 7, 1923, at a meeting of the board of directors of the Ward Baking Company, the offer of said William B. Ward was accepted.

V. Pursuant to the agreement embodied in the offer of December 6, 1923, William B. Ward, on or about December

18, 1923, deposited $1,000,000 in cash with the National Bank of Commerce of New York City.

On December 31, 1923, there had been deposited in said bank, pursuant to said agreement, 85% of the outstanding stock of the Ward Baking Company.

VI. On December 27, 1923, William B. Ward caused to be organized under the laws of the State of Maryland the Ward Baking Corporation, plaintiff herein, with an authorized capital stock of 1,500,000 shares, divided into 500,000 shares of 7% cumulative preferred stock of the par value of $100 per share, 500,000 shares, no par value, class A common stock, and 500,000 shares, no par value, class B common stock.

VII. Among the general powers granted by plaintiff's charter were the right to purchase, lease, acquire, manage, and operate bakeries, factories, and food plants for the production and storage of food articles of any kind; to purchase, acquire, hold, sell, exchange, or otherwise deal in shares of capital stock of any corporation, and to exercise all the rights, powers, and privileges pertaining to said stock; to purchase, acquire, hold, sell, or otherwise dispose of any security or evidence of debt created by any corporation; to acquire the good will, rights, property, and assets of all kinds and to undertake the whole or any part of the liability of any person, firm, association, or corporation engaged in a similar line of business, and to pay for the same in cash, stock, bonds, debentures, or other securities; to borrow money, make and issue promissory notes, bonds, debentures, and evidences of indebtedness of all kinds; to aid in any manner any corporation whose stocks, bonds, or other obligations are held, or in any manner guaranteed by plaintiff company and to do any other acts or things for the preservation, protection, improvement, or enhancement of the value of any such stock, bonds, or other obligations, or to do any other acts or things designed for any such purpose; and to acquire, hold, use, sell, assign, or otherwise to dispose of any trade names, trade-marks, patents, and processes secured under letters patent of the United States or elsewhere.

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VIII. On December 28, 1923, William B. Ward assigned to the plaintiff herein the contract embodied in the aforesaid letter of Dec. 6, 1923, to purchase stock of the Ward Baking Company, and in consideration of said assignment and of the deposit of $1,000,000, as aforesaid, received 500,000 shares of plaintiff's Class B common stock.

IX. On January 1, 1924, William B. Ward sent to all stockholders of the Ward Baking Company a letter stating an offer to exchange stock in the Ward Baking Corporation for stock in the Ward Baking Company on the following basis:

For one share of preferred stock of Ward Baking Company one share of preferred stock and one share of Class B common stock of the Ward Baking Corporation.

For one share of common stock of the Ward Baking Company two shares of preferred stock and one share of Class A common stock of Ward Baking Corporation.

On or about January 1, 1924, William B. Ward returned, without consideration to the Ward Baking Corporation, enough of the Class B common stock of the Ward Baking Corporation for the stock of the Ward Baking Company in pursuance of the proposal of January 1, 1924.

During the period from January 1, 1924, to June 30, 1925, the Ward Baking Corporation continued to purchase, for cash, stock of the Ward Baking Company which the owners thereof had not deposited as provided in said offer of William B. Ward dated December 6, 1923, and which said owners did not desire to exchange for plaintiff's stock.

X. During the period from December, 1923, to June 30, 1924, the Ward Baking Corporation acquired for cash 27,317 shares of preferred stock and 39,045 shares of common stock of the Ward Baking Company. During the period from July 1, 1924, to June 30, 1925, the Ward Baking Corporation acquired for cash 139 shares of the preferred stock and 2 shares of the common stock of the Ward Baking Company.

In order to raise the cash necessary to acquire the stock of the Ward Baking Company, which was not exchanged for the stock of the Ward Baking Corporation, the plaintiff

sold 105,896 shares of its preferred stock at par of $100 per share to the public during the period from December, 1923, to July 1, 1924, receiving therefor the sum of $10,589,600.00 and also for the same purpose plaintiff borrowed on April 26, 1924, and June 27, 1924, from the Ward Baking Company, the sum of $1,000,000.00.

XI. On February 14, 1924, the board of directors of plaintiff authorized the corporation to borrow $5,500,000.00 on its promissory notes, with interest at 6%, of which $1,000,000.00 was to be borrowed from the Marine Trust Co. of Buffalo, $2,000,000.00 from the Chase National Bank of New York City, and $2,500,000.00 from the National Bank of Commerce of New York City, which loans were effected in the amounts stated on February 16, 1924.

XII. Plaintiff repaid during the calendar year 1924 moneys borrowed by it, as follows:

February 20, Bank of Buffalo	$500,000.00
National Bank of Commerce	200,000.00
National Bank of Commerce	50,000.00
National Bank of Commerce	50,000.00
National Bank of Commerce	500,000.00
Bank of Buffalo	200,000.00
National Bank of Commerce	200,000.00
Chase National Bank	200,000.00
March 4, notes payable	300,000.00
March 20, National Bank of Commerce	200,000.00
Chase National Bank	200,000.00
April 1, National Bank of Commerce	300,000.00
April 1, Chase National Bank	300,000.00
April 26, National Bank of Commerce	500,000.00
April 26, Chase National Bank	500,000.00
August 5, Ward Baking Company	200,000.00
August 22, Ward Baking Company	75,000.00
October 31, Ward Baking Company	100,000.00
November 26, Ward Baking Company	359,401.03
December 15, Ward Baking Company	153,863.77

XIII. There were outstanding at all times between December 31, 1923, and to and including June 30, 1926, 88,630 shares of preferred stock and 114,371 shares of common stock of the Ward Baking Company. By February 29, 1924, 169,147 shares out of a total of 203,001 shares of preferred and common stock of the Ward Baking Company outstand-

ing had been deposited for exchange with the National Bank of Commerce.

By June 30, 1924, plaintiff had acquired and owned by purchase or exchange 84,428 out of a total of 88,630 preferred shares and 109,202 out of a total of 114,371 common shares outstanding on that date of the Ward Baking Company.

During the period from July 5, 1924, to June 30, 1926, plaintiff issued shares of its stock in exchange for stock of the Ward Baking Company, as follows: 14,444 shares of preferred stock, 5,179 shares of Class A common stock, and 4,086 shares of Class B common stock.

During the period from December 31, 1923, to June 30, 1926, plaintiff, in exchange for shares of its own stock, acquired stock of the Ward Baking Company, as follows: 61,197 shares of preferred stock and 75,336 shares of common stock.

During the period from June 30, 1924, to June 30, 1925, plaintiff returned to the stockholders of the Ward Baking Company 25 shares of preferred stock and 12 shares of common stock of the Ward Baking Company on account of adjustments.

During the period from July 1, 1924, to December 31, 1925, plaintiff sold 9,029 shares of its preferred stock for cash.

By June 30, 1926, plaintiff had acquired the entire outstanding common stock and all but two shares of the preferred stock of the Ward Baking Company.

XIV. At the various times hereinafter enumerated plaintiff's board of directors acted as set forth, said actions being recorded in the minute book of said corporation, viz.: On April 3, 1924, recommended the purchase of certain real estate in Chicago and the sale of certain property in Warren, Ohio; on May 8, 1924, and June 14, 1924, recommended purchase of patent rights to manufacture "Vitavose"; on July 17, 1924, set aside 4% of its sales for use in advertising and sales promotion; on September 25, 1924, the vice president of plaintiff reported on the purchase of patents and real estate; on December 4, 1924, recommended purchase of cer-

tain real estate in Detroit, Mich.; on January 8, 1925, recommended placing recently acquired property under a bond and mortgage; and on February 26, 1925, recommended purchase of certain real estate in Baltimore, Md.

On April 1, 1926, the board of directors authorized the president to purchase on the open market, out of surplus earnings, preferred stock of plaintiff corporation up to one million dollars, at a price not exceeding $100 per share, and also authorized him to proceed with the expansion of the cake business by renting suitable buildings and equipping them " in cities where the population and conditions warrant."

During the year ended June 30, 1926, plaintiff expended the total sum of $558,255.00 in the purchase at varying prices of its own stock for the purpose of retiring said stock.

XV. During the year ended June 30, 1925, plaintiff received $2,182,413.30 as dividends on the stock of the Ward Baking Company; during said period plaintiff received $117,192.09 in payment of subscriptions to the preferred stock of plaintiff and all of said subscriptions were received prior to June 30, 1924; plaintiff received $142,749.50 on account of subscriptions to plaintiff's preferred stock which were received during the period July 1, 1924, to June 30, 1925; it received $3,356.28 from interest on bank balances, $4,934.84 from the trustees with whom William B. Ward had deposited the $1,000,000 as hereinbefore set forth, said payment having been made because certain stockholders of the Ward Baking Company accepted for their stock in that company the stock of the plaintiff corporation instead of cash, which had previously been deposited with the trustees with which to purchase said stock, and $1,726.02 as accrued dividends returned to plaintiff by purchasers of plaintiff's preferred stock.

XVI. During the year ended June 30, 1925, plaintiff's disbursements for dividends paid on outstanding stock, repayment of loan made by Ward Baking Company, organization expenses, purchase of preferred stock of Ward Bak-

ing Company, and refund of subscription to preferred stock of plaintiff aggregated the sum of $2,882,053.75.

XVII. During the year ended June 30, 1926, plaintiff's receipts for dividends on stock of Ward Baking Company and interest on bank balances aggregated the sum of $2,966,509.71.

During the same period plaintiff's disbursements for dividends on its outstanding capital stock, reimbursement to Ward Baking Company for Federal taxes paid, and retirement of plaintiff's preferred stock aggregated the sum of $2,942,886.37.

XVIII. Throughout the period from January 1, 1924, to June 30, 1926, plaintiff's board of directors met at five-week intervals and declared periodic dividends on the stock of the Ward Baking Corporation.

During this period the Ward Baking Company was actively engaged in the baking and sale of bread and cake. Throughout said period plaintiff generally managed, supervised, and directed the business of the Ward Baking Company.

XIX. The plaintiff has at all times occupied the offices of the Ward Baking Company at 143rd Street and Southern Boulevard, Bronx Borough, New Nork City; all the books of the plaintiff are kept in this office and posted by employees of the Ward Baking Company; from June 30, 1924, to and including June 30, 1926, plaintiff had no employees other than its officers and directors, and during said period neither its officers nor its directors received any compensation for their services.

XX. It was the policy of the plaintiff immediately upon receipt by it of a dividend declared on the stock of the Ward Baking Company to declare a dividend on plaintiff's stock, passing on the sums so received to its stockholders, the sole exception to this being the use of two dividends to retire a part of plaintiff's preferred stock.

XXI. During the period July 1, 1924, to June 30, 1926, the executive offices of the Ward Baking Company were held by the same individuals as the corresponding offices in

the plaintiff corporation, and during said period the individuals who were the directors of the Ward Baking Company were also directors of the plaintiff.

During the period mentioned plaintiff maintained its corporate existence and elected officers.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

In this tax case the plaintiff, a Maryland corporation, sues to recover $59,085 assessed and paid by it upon the capital stock of the corporation for the years ending June 30, 1925, and June 30, 1926. The applicable section of the revenue act of 1924, under which the taxes were collected (43 Stat. 325), reads as follows:

"SEC. 700. (a) On and after July 1, 1924, in lieu of the tax imposed by section 1000 of the revenue act of 1921—

"(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in the excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included; * * *

"(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or, in the case of a foreign corporation, not engaged in business in the United States) during the preceding year ending June 30, * * *."

The plaintiff's right of recovery is predicated upon an allegation that it was not engaged in business during the taxable years in question. The record involves two corporations, the Ward Baking Company and the Ward Baking Corporation, the latter—i. e., the plaintiff—coming into existence, as plaintiff contends, as a holding company, limiting its activities substantially to the single purpose of receiving and disbursing dividends from its stock holdings in the Ward Baking Company.

On December 6, 1923, William B. Ward transmitted to George S. Ward, president of the Ward Baking Company, a written offer to purchase not less than 51 per cent of the

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stock of his company. The price was fixed at $100 per share for preferred and $200 per share for common stock. The usual guaranties for the performance of the contract were written into the offer and the same was to expire on December 31, 1923, with an express reservation to accept stock on the same terms subsequent to that date. Acceptance of the offer was also conditioned upon the resignation of the directors and officers of the baking company, as well as the right to verify the stated value of the stock as of November 19, 1923.

Without repetition of tedious details and figures indicating value, it is sufficient to say that Mr. Ward by the offer desired to secure a majority of the baking company's stock in order to organize a new corporation, through which he anticipated financing the transaction, and set up a holding company. The offer was accepted and the transaction carried out as per agreement. The plaintiff corporation was duly organized and incorporated under the laws of Maryland. It is now and has been since its organization the owner of practically all the outstanding stock of the Ward Baking Company.

The issue in this case is not a new one. Contentions identical in all respects have been many times before the courts, and we think the precedents are ample and point out with a degree of exactness the established rules for determining the fact whether the corporation claiming exemption from taxation was or was not "engaged in business." If the activities of the corporation were of a passive character, restricted to the management and control of its own peculiar affairs, and do not extend to the affairs of the parent corporation in such a way as to make the latter in fact more of a subsidiary and dependent organization than an independent organization, it may not escape the classification of one engaged in business. The charter of the plaintiff corporation was comprehensive; it authorized a broad field of corporate activity, and if it so employed its corporate powers as to assume the management of, direct the policies, and actively participate in the every-day affairs of the parent company the corporation was obviously doing more than

collecting and disbursing dividends received upon the stock which it owned. If such be the case the holding company is, as a matter of fact, the dominant factor in the mutual interests of the two companies, and upon its activities the course pursued depends. As the Supreme Court said in the *Chile Copper Company case*, 270 U. S. 452, 455: "The activities and situation must be judged as a whole. Looking at them as a whole we see that the plaintiff was a good deal more than a mere conduit for the Chile Exploration Company. It was its brain or at least the efferent nerve without which that company could not move." In the *Von Baumbach case*, 242 U. S. 503, 516, the Supreme Court said: "The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes." This court had a case somewhat similar in principle before it in the *Chevrolet Motor Co.* v. *United States*, 64 C. Cls. 211, wherein one corporation was active not only in its own affairs, but loaned and employed its corporate powers in promoting the affairs of another corporation, a case where mutuality of interest induced reciprocal activities, and in that case, as we believe in this, the plaintiff company was engaged in and doing business.

The record herein discloses that the plaintiff company was, as claimed, organized to acquire the stock of the Ward Baking Company. To accomplish the purchase thereof the plaintiff borrowed from the Ward Baking Company and from banks large sums of money, and projected itself into the active management of its subsidiary. If real estate was acquired by the Ward Baking Company to expand its business the plaintiff company first passed upon the wisdom and necessity for so doing. Patent rights were purchased by the Ward Baking Company upon the recommendation of the plaintiff. The extent and policy of advertising cam-

paigns were reviewed by the plaintiff, and throughout all the years involved the plaintiff continued to participate and take a lively and directing interest in practically every step taken by the baking company. These transactions, involving sometimes sums in excess of a million dollars, every one of which, from the standpoint of importance, required the exercise of business activity, the employment of much more effort than attention to its stock holdings, are convincing proof that the plaintiff not only did engage in business, but had in mind as the one purpose of its organization the direction and control of the Ward Baking Company. As a matter of fact, we think the record warrants an inference that, following the organization of the plaintiff corporation, the Ward Baking Company limited its activities to baking bread, and the plaintiff directed and controlled its fiscal and general business policies in all their aspects without interference from the company. "The cases," as said by the Supreme Court, "must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes."

Plaintiff, we think, misconceives the applicability of many of the cases cited to sustain its contention—too many to justify detailed review. The mere fact that one corporation did this and another that is not alone decisive of the issue. The courts, we think, establish the principle that a corporation may not escape taxation upon this ground, when it is manifest from the record that it is actively engaged in expanding the trade, increasing the assets and dividends of the corporation whose stock is its only asset, by assuming management and control of its subsidiary. It was not alone advice given by the plaintiff that determined policies the plaintiff assumed, but it continuously busied itself with the baking company's affairs, and took advantage of its corporate powers to maintain a corporate organization for the sole purpose of doing the identical thing it did do. It is not the volume of business done, but rather the doing of business, the act of engaging continuously in business activities which are not merely incidental but substantial and redound in increased profits by reason of their performance.

It would be difficult to read the record herein and come to any other conclusion than the one which seems to establish the fact that the plaintiff herein was an active, aggressive organization, lending all its energy and business acumen to the expansion of the baking business and reaching out for increased volume of receipts in every legitimate way, for the sole purpose of augmenting by its own activities the value of the great amount of baking company stock it held.

The petition will be dismissed. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

PIEDMONT GROCERY CO. v. THE UNITED STATES

[No. F-127. Decided December 3, 1928]

On the Proofs

Income and profits taxes; losses and debts; embezzlement covered by bond; suit on bond.—Plaintiff having in 1917 suffered embezzlement of its funds carried the amount of the bond covering same during the taxable year as an asset and did not charge the amount off as a loss. In 1918 the bonding company denied liability and plaintiff in its income-tax return for that year claimed deduction of said amount as a worthless debt. In 1919 plaintiff lost a suit on the bond but in 1920 prevailed on appeal, and was paid the amount of the bond. *Held*, that the said amount was a loss sustained during the year 1917 compensated for by insurance, therefore not deductible in the income-tax return, and was not, by reason of the bonding company's denial of liability, a debt ascertained to be worthless. Nor was the adverse judgment of the lower court an ascertainment of the worthlessness of the amount as a debt. The appeal was merely a step in enforcement of the claim and related back to the loss.

The Reporter's statement of the case:

Mr. Harry G. Fisher for the plaintiff.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. R. W. Wilson* was on the brief.

Reporter's Statement of the Case

The court made special findings of fact, as follows:

I. Plaintiff is a corporation engaged in the wholesale grocery business at Piedmont, West Virginia.

II. During the year 1917 and for some years prior thereto, plaintiff had in its employ, as secretary and treasurer, one A. F. Hawkins; and the United States Fidelity and Guaranty Company had executed and delivered to the plaintiff a bond to indemnify the plaintiff against loss to the amount of $10,000 from embezzlement of the plaintiff's funds by said Hawkins, which bond was in force at the time of the transactions involved in this case.

III. In November, 1917, it was discovered that Hawkins had embezzled amounts of money from the plaintiff totaling $18,208.02. Of this amount, $8,208.02 was deducted by plaintiff from income on its 1917 return and allowed by the commissioner as a deductible loss for that year on plaintiff's return for income tax. The remainder, to wit, $10,000, covered by the indemnifying bond was not charged off in 1917, but was carried on plaintiff's books as an asset.

IV. On December 3, 1917, the plaintiff notified the United States Fidelity and Guaranty Company of the embezzlement of Hawkins. On March 5, 1918, the said guaranty company notified plaintiff that it denied liability on the bond. On May 31, 1918, plaintiff began suit against the bonding company and Hawkins to recover $10,000, the amount of the bond.

V. In determining its taxable net income for 1918 in its return filed for that year, plaintiff deducted from income the amount of $10,000 for which suit was then pending against the said guaranty company and Hawkins on the said indemnifying bond. This deduction was included in a total deduction of $13,208.14 shown upon the plaintiff's return and designated as "Debts ascertained to be worthless and charged off within the taxable year."

VI. On December 30, 1919, the Circuit Court for Mineral County, West Virginia, rendered judgment in favor of the defendant and against the plaintiff in the said suit upon bond. An appeal was taken from this judgment and on September 8, 1920, the Supreme Court of Appeals of said State reversed the lower court and judgment was rendered

in favor of the plaintiff and against the United States Fidelity and Guaranty Company for the full amount of the bond; and thereafter, during the year 1920, $10,000, being the full amount of said judgment, was paid to the plaintiff. Plaintiff included the said $10,000 within its gross income for the taxable year 1920, and paid $539.03 as income tax thereon for that year. Upon audit of the plaintiff's return for 1920, the Commissioner of Internal Revenue deducted the said amount of $10,000 from the plaintiff's income for 1920, which eliminated all taxable income and tax liability for said year, and the commissioner issued a certificate of overassessment for $539.03, tax paid by plaintiff, which amount was duly refunded to plaintiff.

In the event that this court should hold that the plaintiff is entitled to recover any amount for the year 1918, or 1919, it is agreed that the amount of recovery shall be reduced by the said amount of $539.03 already refunded for the year 1920 as aforesaid.

VII. In 1923, the Commissioner of Internal Revenue, upon final audit made of the plaintiff's return and income for the year 1918, disallowed the deduction of $10,000 taken by plaintiff, as stated in Finding V, and after making certain other changes, determined that there was due from plaintiff an additional income and profits tax for 1918 in the sum of $6,430, of which $5,011.73 was based upon the disallowance of the said deduction of $10,000. This additional tax was paid by plaintiff to the collector as follows: $1,418.27 on May 14, 1924, and $5,011.73 on May 19, 1924.

VIII. On May 20, 1924, the plaintiff filed with the commissioner a claim for the refund of said $5,001.73, which was rejected by the commissioner under date of July 22, 1924.

IX. On the 22d day of March, 1924, an additional tax of $860.84 was assessed against the plaintiff for the year 1919, which additional tax was paid to the collector of internal revenue under protest about May 14, 1924. The said additional tax of $860.84 so assessed and paid for the year 1919 is a sum less than the amount of tax which would be over-

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paid for the year 1919, provided the plaintiff is entitled to take the aforesaid item of $10,000 as a deduction from income for the year 1919.

X. On the 15th day of June, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of the said $860.84, which was rejected by the commissioner on October 29, 1926.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff brings this suit to recover $5,011.73 alleged to be due as a refund on account of the refusal of the Commissioner of Internal Revenue to allow a deduction of $10,000 in its income-tax return for 1918; and alternatively asks judgment for $860.84 on account of the refusal of the commissioner to allow a similar deduction in its income-tax return for 1919, which it alleges should be made if the deduction is not allowed for 1918.

It appears that in 1917 it was discovered that an employee of the plaintiff had embezzled $18,208.02 from it. Plaintiff held a bond indemnifying it against such loss in the sum of $10,000. In 1918 the bonding company denied liability and plaintiff brought suit against it upon the bond. Later in the same year the court in which suit was begun entered judgment against the plaintiff, but upon appeal being taken, the Supreme Court of West Virginia in 1920 reversed the lower court and gave judgment against the bonding company for $10,000, which was thereafter in the same year paid to plaintiff.

In making its income-tax return for 1917 plaintiff was allowed a deduction for the amount of the embezzlement above the amount of the bond, which for that year it carried on its books as an asset. In its 1918 tax return the plaintiff deducted $10,000 from its income (being the amount for which suit was then pending against the bonding company) as a " debt ascertained to be worthless and charged off within

the taxable year." In 1920 the plaintiff included as income the $10,000 paid by the bonding company on the judgment rendered upon the bond, and by reason thereof paid $539.03 over and above what it would have otherwise paid. The Commissioner of Internal Revenue, however, subsequently held that the $10,000 should not have been included in plaintiff's income for 1920 and refunded the tax thereon. Upon a final audit of plaintiff's 1918 tax return, the commissioner disallowed the deduction of $10,000 claimed as a result of the embezzlement and the denial of liability by the bonding company; and by reason of such disallowance assessed the plaintiff for additional taxes in the sum of $5,011.73 for which, as stated above, it asks judgment.

The contention of the plaintiff is that it might have claimed a loss for 1917, but at that time it did not know that the bonding company disclaimed liability on the bond; that it was right in making the deduction of $10,000 in 1918, because the bonding company had then denied the liability; and that if this deduction could not be rightfully made for 1918, it at least should be made for 1919, when the lower State court rendered judgment against plaintiff on the bond. It is urged on behalf of plaintiff that the events and transactions above set forth for the purposes of income-tax returns changed the loss occasioned by the embezzlement into a debt owed by the bonding company.

The defendant contends, on the contrary, that losses by embezzlement must be deducted, if at all, for the year in which the embezzlement occurred, and that in fact there was no deductible loss except for the sum above the amount of the bond, which sum was allowed the plaintiff in its 1917 return.

The revenue acts in force at the time of the transactions involved allow as deductions:

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise;

"(5) Debts ascertained to be worthless and charged off within the taxable year."

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The Board of Tax Appeals has consistently held in several cases that where an embezzlement occurs the loss resulting therefrom is deductible for the year in which the embezzlement occurred. The embezzlement gave rise to an indebtedness on the bond, and the theory of plaintiff is that when the bonding company denied liability this became a "debt ascertained to be worthless," and being charged off in the year 1918 it was entitled to a deduction for that year in the amount of the bond; or, failing in this, plaintiff contends that in any event it was entitled to the deduction in 1920, when the lower court, in the suit upon the bond, rendered judgment in favor of the bonding company. Several cases are cited in support of this contention, but it is not necessary to review them here. It is clear that they were decided upon a very different state of facts, and we think there is nothing in the language used in deciding these cases that is applicable to the case at bar. That plaintiff sustained a loss when the embezzlement occurred does not seem to us to admit of argument or discussion, and the fact that the loss created an indebtedness on the bond would not prevent the application of the law as to when the loss occurred. An examination of the statutory provisions makes the meaning and intent of the law quite plain. The provisions of subdivision (4), quoted above, were clearly intended to apply to just such a case as we have here—where a loss was sustained which was deductible if not compensated for by insurance or otherwise, but if so compensated was not deductible. Obviously, as it seems to us, subdivision (5) was not intended to apply to cases of this character. The Treasury regulations accord with this construction of the statute.

Much is said in the argument for plaintiff as to what plaintiff believed with relation to the collectibility of the claim on the bond, but plaintiff's belief alone does not determine the matter. If it did, plaintiff's beliefs would control instead of what we think is the plain intendment of the law. Where a loss has created a claim against another party,

in order to justify treating the claim as unenforceable, the attendant circumstances must be such as to indicate that action or proceedings to collect the claim would be unavailing. This is in accordance with the regulations with reference to bad debts, and is, we think, the true rule. The recovery of judgment on the bond sufficiently proves that such circumstances did not exist.

Plaintiff also urges that when the lower court rendered judgment in favor of the bonding company its claim on the bond was extinguished under the decisions of the West Virginia courts; and that when a writ of error was taken out in the Supreme Court for the purpose of reviewing the judgment an entirely new claim and new case was created. This, we think, was immaterial. It was the duty of plaintiff to take any legal steps which might enforce payment, unless the circumstances were such that there could be no reasonable expectation of obtaining payment thereby. The appeal to the Supreme Court was only another step in enforcing the plaintiff's claim which related back to the loss caused by the embezzlement.

Having thus concluded that plaintiff's claim, if any, rests upon a loss and not upon a bad debt, the next question is whether the loss which was sustained was a deductible one. On this point it appears plain that the loss was, in the language of the statute, "compensated for" through the bond and the judgment finally obtained upon it. It was not therefore a *deductible* loss.

It follows that the rulings of the commissioner with reference to the assessment and returns of plaintiff's income tax for the years in question were right, and this conclusion makes it unnecessary to consider the other points which arise in the case. Plaintiff is not entitled to recover, and it is ordered that its petition be dismissed.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

CHARLES B. LONG v. THE UNITED STATES

[No. H–412. Decided December 3, 1928]

On the Proofs

Income tax; dividends applied by trustee to purchase price of shares of stock; income of purchaser.—Under the terms of a contract of sale the shares of stock sold were indorsed in blank and deposited with a trust company, payment therefor being made in installments, the dividends being applied by the trust company in satisfaction of the purchase price and interest thereon, the vendor retaining his voting rights on the balance of the shares unpaid for, the shares as they were paid for being transferred to the purchaser. The purchaser kept his books and made his tax returns on a "cash received and paid" basis. *Held*, that the dividends paid to the trustee on shares not yet transferred to the purchaser constituted taxable income to the purchaser for the year in which paid.

The Reporter's statement of the case:

Mr. John H. Small for the plaintiff.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Charles B. Long is a citizen of the United States and a resident of the city of Lancaster in the State of Pennsylvania, and resides in the first United States internal revenue collection district of said State, the office of said collection district being in the city of Philadelphia, and the Champion Blower & Forge Co. is a corporation organized under the laws of Pennsylvania and having its principal place of business at said Lancaster.

II. Plaintiff filed his income-tax returns for the years 1917, 1918, and 1919, and paid the tax assessed thereon as provided by the revenue act of 1916, as amended by the revenue act of 1917 and under the revenue act of 1918 and

the regulations issued thereunder, and the amounts of tax assessed for the respective years were as follows:

For the year 1917 in the sum of.............. $735.24
For the year 1918 in the sum of.............. 2,511.54
For the year 1919 in the sum of.............. 3,206.88

That additional taxes were assessed as follows:

For the year 1917 in the sum of.............. $342.82
For the year 1918 in the sum of.............. 3,789.62
For the year 1919 in the sum of.............. 5,229.67

Plaintiff paid the above-recited additional taxes upon receipt of notice and demand and within the time prescribed by law to the collector of internal revenue at Philadelphia, as follows:

For the year 1917 on Dec. 3, 1923.............. $342.82
For the year 1918 on Dec. 3, 1923.............. 3,789.62
For the year 1919 on Dec. 3, 1923.............. 5,229.67

III. Plaintiff filed his claim for refund of the aforesaid additional taxes for each of the years 1917, 1918, and 1919 with the collector of internal revenue at Philadelphia on the 31st day of August, 1925, for the respective sums as follows:

For the year 1917 for the sum of.............. $337.61
For the year 1918 for the sum of.............. 3,789.62
For the year 1919 for the sum of.............. 5,229.68

The Commissioner of Internal Revenue on August 2, 1926, addressed a letter to the plaintiff rejecting and disallowing the said claims for refund.

IV. On January 6, 1912, an agreement was entered into between J. L. Huye, of the first part, Charles B. Long (the plaintiff herein), of the second part, and the Lancaster Trust Co., trustee, of the third part; and copy of said agreement attached to the petition as Exhibit A is made a part of this finding by reference.

V. Under the terms of said agreement Charles B. Long, the plaintiff herein, contracted to purchase and pay for 184 shares of stock of the Champion Blower & Forge Co., owned by J. L. Huye in the manner provided in said agreement; and said stock was deposited with the Lancaster Trust Co., trustee, indorsed in blank by J. L. Huye, to be held in trust until paid for as provided in said trust agreement.

Reporter's Statement of the Case

VI. Plaintiff paid for and the shares of stock mentioned in the aforesaid agreement were issued to the said Charles B. Long as follows:

20 shares issued April 2, 1914.
20 shares issued April 12, 1915.
10 shares issued April 1, 1916.
10 shares issued April 5, 1917.
20 shares issued May 23, 1918.
20 shares issued April 1, 1919.
84 shares issued August 28, 1919.

184 shares.

VII. In 1917 the Champion Blower & Forge Co. paid to the Lancaster Trust Co., trustee, for the credit of the plaintiff under the terms of the original contract, dividends upon the stock owned by him amounting to $8,325. Of this amount $1,875 was paid out of earnings for the year 1916 and was taxable at 1916 rates, and $6,450 thereof was taxable at 1917 rates.

VIII. For the year 1917 the Champion Blower & Forge Co. paid to the Lancaster Trust Co., trustee, on the stock held by it dividends amounting to $19,275, making the total dividend paid on the stock owned by the plaintiff and that held by the trustee (a total of 184 shares) $27,600.

IX. In 1918 the Champion Blower & Forge Co., paid to the Lancaster Trust Co., trustee, for the credit of the plaintiff dividends upon the stock owned by him amounting to the sum of $10,500.

X. For the year 1918 the Champion Blower & Forge Co. paid to the Lancaster Trust Co., trustee, on the stock held by it dividends amounting to $17,100, making the total dividend paid on the stock owned by the plaintiff and that held by the trustee (a total of 184 shares) the sum of $27,600.

XI. In 1919 the Champion Blower & Forge Co. paid to the Lancaster Trust Co., trustee, for the credit of the plaintiff dividends upon the stock owned by him amounting to $18,000.

XII. For the year 1919 the Champion Blower & Forge Co. paid to the Lancaster Trust Co., trustee, on the stock held by it dividends amounting to $19,260, making the total

dividends paid on stock owned by the plaintiff and that held by the trustee (a total of 184 shares) the sum of $37,260.

XIII. Plaintiff owned all of the 184 shares of the stock herein referred to from August 28, 1919, to December 31, 1919, and for that period he received dividends on said stock in the amount of $17,940, which, added to the $18,000 dividends paid to the Lancaster Trust Co., trustee, for the credit of plaintiff in the same year, will make a total of $35,940 as dividends paid on stock owned by the plaintiff during 1919.

XIV. Plaintiff for the years 1917, 1918, and 1919 kept his books and made his tax returns upon "cash received and paid" basis, and was required under the revenue act of 1916, as amended by the revenue act of 1917, and under the revenue act of 1918, to include in his tax returns the dividends received by him for the respective years.

XV. Plaintiff in conformity with the revenue act of 1916, as amended by the revenue act of 1917, and under the revenue act of 1918, and the regulations thereunder, included in his income-tax returns for the years 1917, 1918, and 1919 all of the dividends paid on stock standing in his name on the books of the company, as hereinbefore set forth, and paid the income tax assessed thereon.

XVI. If the court finds that only the dividends paid on stock standing in the plaintiff's name on the books of the Champion Blower & Forge Co. are taxable to him for the years in question, he is entitled to recover the following amounts:

For the year 1917	$541.91
For the year 1918	3,806.13
For the year 1919	1,675.04
Total	6,023.08

XVII. If the court finds that the plaintiff is taxable on all the dividends paid to the Lancaster Trust Co. under the agreement marked "Exhibit A" during the years in question, judgment shall be for the defendant.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

Moss, *Judge*, delivered the opinion of the court:

On January 6, 1912, an agreement was entered into between one J. L. Huye and plaintiff, Charles B. Long, and the Lancaster Trust Company, trustee, under the terms of which plaintiff Long contracted to purchase and pay for 184 shares of stock of the Champion Blower & Forge Company, then owned by J. L. Huye. Said stock was endorsed in blank and deposited with the Lancaster Trust Company, trustee, to be held until paid for in the manner provided in said trust agreement, a copy of which is attached to the petition as a part thereof marked for identification "Exhibit A." It was provided in said trust agreement that plaintiff should pay the sum of $230,000 for said stock, payable in semi-annual installments of $1,500 with an option in the purchaser to increase any installment, the entire purchase price to be paid on or before April 1, 1924. The trust company held the stock, collected the dividends on same, which, by the terms of the agreement, were credited to the "Huye-Long trust." It collected the installment payments and paid same over to Huye, and on April 1 each year it delivered to plaintiff Long such stock as had been paid for. The stipulation of facts herein sets forth the transfers of stock from the trust company to the plaintiff, and shows that the final transfer occurred on August 28, 1919, at which time the trust was closed and plaintiff became the full owner of the 184 shares of stock.

Plaintiff included in his tax returns for 1917, 1918, and 1919 only such dividends as were derived from shares of stock for which plaintiff had paid, and which had been transferred on the books of the issuing company and delivered to plaintiff. The Commissioner of Internal Revenue, in the belief that all dividends which had been paid to the trust company constituted income to plaintiff, assessed against him additional tax in the sum of $6,023.08. We think the action of the commissioner in this regard was correct. The additional tax was paid under protest, and this action is for the recovery of said amount.

Opinion of the Court

The sole question to be determined is whether or not dividends paid to the Lancaster Trust Company, trustee, on shares of stock which had not been transferred and delivered to plaintiff constitute taxable income to plaintiff for the years in question.

Plaintiff contends that the title to the stock remained in the seller, Huye, until transferred on the books and delivered to plaintiff, and announces the principle that dividends declared by a corporation belong to the owner of the stock at the time the dividends are declared, citing certain cases in support of that theory. The determination of this question as a general principle of law is not important in the decision of the case. The whole transaction became the subject matter of the contract, by which the rights of the parties are to be determined.

The stock which formed the basis of the transaction now under consideration was deposited with the trustee only as security for the payment of the agreed purchase price. Throughout the life of the agreement plaintiff was the beneficial owner of the stock, the bare legal title being held by the trustee, to secure the seller, Huye, in the payment of the purchase price of the stock. At all times plaintiff, Long, received the benefit of *all dividends* paid into the hands of the trustee, which dividends were applied, first, to the payment of interest, and the remainder, if any, to the discharge of the principal indebtedness. The disposition of the dividends paid in under the trust agreement was not affected by the question of the actual transfer of the stock paid for, and the delivery of same, on stated periods, to plaintiff. Nor does the provision with reference to voting rights in the stock affect the question of dividends, which, under the contract, were applied to plaintiff's indebtedness without any condition or restriction whatever. The only purpose of the provision concerning the voting of the stock was as stated in the agreement, "to the end and purpose that Huye shall always have increasingly more security in stock than at the time of executing this agreement." Plaintiff was taxable for the years in question on all dividends paid

Syllabus

to the Lancaster Trust Company under the agreement in question. Judgment for the defendant will be entered, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge,* and BOOTH, *Chief Justice,* concur.

MINNESOTA MUTUAL LIFE INSURANCE CO. v. THE UNITED STATES[1]

[No. F-65. Decided December 3, 1928]

On the Proofs

Insurance tax; termination of unlimited waiver of statutory limitations.—By the revenue acts of 1924, 1925, and 1926, Congress enabled taxpayers, who came within the terms of the statute, to obtain refund if claim therefor had been filed on or before April 1, 1926, and a taxpayer who, at the request of the Commissioner of Internal Revenue, filed an unlimited waiver on May 5, 1921, waiving all statutory limitation as to the time within which assessments might be made on net income for 1917, and submitted a claim in due form April 4, 1925, is not to be denied relief because of an attempted termination of the waiver as of April 1, 1924, by the commissioner, assuming to act under section 252 of the revenue act of 1921.

Same; premium payments; invested capital.—Premium payments paid in for insurance policies, constituting part of a mutual life insurance company's legal reserves, are invested capital and to be so treated in calculation of the company's excess profits for tax purposes.

Same; tontine policies; net additions to deferred dividend reserves.—In allowing as deductions in the case of insurance companies, for the purpose of computing net income subject to tax, "the net addition required by law to be made within the taxable year to reserve funds," it was the purpose of Congress to limit such reserves to those maintained "as against the contingent liability on outstanding policies." Deferred dividends on tontine policies held as reserves are contingent in their annual allocation upon the prosperity of the company, are maintained to secure financial stability, and are not the reserves the net additions to which are deductible under section 234 (a) (10) (a) of the revenue act of 1918.

[1] Certiorari denied.

The Reporter's statement of the case:

Mr. A. R. Serven for the plaintiff. *Messrs. John G. Carter* and *John W. Smith* were on the briefs.

Mr. Edward H. Horton, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Dwight E. Rorer* was on the briefs.

Mr. John William Townsend as amicus curiae. *Messrs. J. Wilmer Latimer* and *James Craig Peacock* were on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a mutual life insurance company, having no capital stock, duly organized and existing under the laws of the State of Minnesota, with its principal or home office in the city of St. Paul in said State. Plaintiff has always been loyal to the United States and has never assigned the claims involved in this suit, or any part thereof.

II. The plaintiff is now, and since prior to the year 1916 has been continuously, engaged in the business of making and selling life insurance on the legal reserve old line, or level premium, basis in the States of Minnesota, Illinois, Michigan, Missouri, Nebraska, Montana, North Dakota, and other States of the United States, and has duly complied with the insurance laws of said States, and with the rules and regulations of the insurance departments thereof.

In the transaction of its said insurance business, during the years involved in this suit, the plaintiff's accounts have been kept and its tax returns have been made on the cash, or paid and received, basis.

III. The plaintiff duly made its income, profits, and capital-stock tax returns to the Commissioner of Internal Revenue for the years 1917 to 1921, inclusive. For the year 1917 plaintiff filed with said commissioner two excess-profits tax returns, one in accordance with the Treasury regulations for the computation of invested capital, and the other in which plaintiff computed its invested capital in accordance with its own interpretation of the statutory provisions prescribing such computation, and which found no profits-

tax liability for said year. Plaintiff was assessed and has paid taxes upon its said returns, as hereinafter set forth.

IV. In the year 1918 the Commissioner of Internal Revenue assessed against the plaintiff an excess-profits tax of $4,319.00 for the year 1917, which was paid by plaintiff, under written protest, on June 7, 1918. Thereafter, said commissioner assessed against the plaintiff an additional excess-profits tax of $116.64 for the year 1917, which plaintiff paid, under written protest, on November 16, 1921, making a total payment by plaintiff of $4,435.64 as excess-profits tax for the year 1917.

V. In his computation of the excess-profits tax so paid by the plaintiff for the year 1917, the Commissioner of Internal Revenue included in gross income the income realized by plaintiff from its investments representing the reserve funds maintained by it, as required by law, but failed and refused to include in plaintiff's invested capital for said year any part of said reserve funds maintained by plaintiff, which failure and refusal by the commissioner resulted in the assessment and payment of the said $4,435.64 profits tax herein sought by plaintiff to be recovered.

VI. Under date of July 25, 1918, the plaintiff filed with the Commissioner of Internal Revenue a claim for refund of the said $4,319.00 profits tax paid by it June 7, 1918, for the year 1917, on the ground that the commissioner in his computation of said tax erroneously failed to include in plaintiff's invested capital for said year its reserve funds required by law. Said claim was disallowed by the commissioner on June 7, 1921.

VII. Under date of May 5, 1921, at the request of the Commissioner of Internal Revenue, an unlimited waiver was filed by the plaintiff with said commissioner for the year 1917 waiving all statutory limitation as to the time within which the commissioner could assess taxes upon the plaintiff's net income for the year 1917. Thereafter, when plaintiff learned that the commissioner considered that its unlimited waiver for 1917 would expire, the plaintiff, on May 21, 1925, filed with the commissioner an extension of said

unlimited waiver dated April 30, 1925, for one year from April 30, 1925.

VIII. Under date of April 4, 1925, the plaintiff filed with the Commissioner of Internal Revenue a claim for the refund of the total $4,435.64 profits tax paid by it for the year 1917, on the ground that said tax resulted from the commissioner erroneously failing, in his computation thereof, to include in invested capital for said year any part of plaintiff's reserve funds allowed by the commissioner as being required by law. Said claim was disallowed by the commissioner July 31, 1925.

IX. The plaintiff's said reserve funds, on December 31, 1916, which were allowed by the commissioner as reserve funds required by law, amounted to $4,374,834.64, of which amount not less than $2,554,794.50 consisted of premium payments by policyholders and the remaining $1,820,040.14 consisted in part of similar premium payments and in part of interest on reserve fund investments.

If the said $2,554,794.50 of said reserve funds had been included by the commissioner in plaintiff's invested capital, the plaintiff would have had no profits tax liability for the year 1917.

X. In the year 1918 the Commissioner of Internal Revenue assessed against the plaintiff an income tax of $4,254.42 for the year 1917, which was paid by plaintiff June 7, 1918. Thereafter said commissioner assessed against the plaintiff an additional income tax of $1,012.75 for the year 1917, which was paid by plaintiff, under written protest, on November 16, 1921, making a total payment by plaintiff of $5,267.17 as income tax for the year 1917.

On April 4, 1925, plaintiff filed with said commissioner a claim for refund of the total $5,267.17 income tax paid by it for the year 1917, which claim was disallowed by the commissioner on July 31, 1925.

XI. In the year 1919 the Commissioner of Internal Revenue assessed against the plaintiff for the year 1918 an income tax of $3,245.21, which was paid by plaintiff, under written protest, as follows: March 15, 1919, $1,742.61, and June 13, 1919, $1,502.60. Thereafter said commissioner as-

sessed against the plaintiff an additional income tax of $1,815.90 for the year 1918, which was paid by plaintiff, under written protest, May 18, 1922, making a total income tax of $5,061.11 paid by plaintiff for the year 1918.

On June 8, 1925, the plaintiff filed with said commissioner a claim for the refund of said $5,061.11 income tax paid by it for the year 1918, which claim was disallowed by the commissioner December 21, 1925.

XII. The plaintiff's tax return for the year 1920, as filed, showed no income tax liability for that year, but thereafter the Commissioner of Internal Revenue assessed against the plaintiff an income tax of $1,575.42 for said year 1920, with a penalty of $78.77 thereon, which tax and penalty were paid by plaintiff, under written protest, March 2, 1923, making a total payment of $1,654.19 for the year 1920.

On June 8, 1925, the plaintiff filed with said commissioner a claim for refund of said $1,575.42 tax and $78.77 penalty so paid by it, which claim was disallowed by the commissioner December 21, 1925.

XIII. In the computation by the Commissioner of Internal Revenue of the plaintiff's income tax for the years 1917, 1918, and 1920, and in his consideration and disallowance of plaintiff's income tax refund claims for said years, said commissioner failed and refused to allow as deductions from gross income, the plaintiff's net additions, for said years, to the reserve funds set up and maintained by it on account of deferred dividends, as required by section 1 of chapter 201 of the 1907 Minnesota laws, effective January 1, 1908, and by the laws of other States in which the plaintiff transacted its said insurance business.

The said deferred dividend reserve funds so set up and maintained by the plaintiff for the years 1916 to 1920, inclusive, were as follows:

December 31, 1916, $137,755.10; December 31, 1917, $154,517.55; December 31, 1918, $172,818.39; December 31, 1919, $196,321.28; December 31, 1920, $221,496.79; and the net additions to said reserve funds so required for the years 1917, 1918, and 1920 were—for 1917, $16,762.45; for 1918, $18,300.84; and for 1920, $25,175.51.

If the deductions of said net additions to deferred dividend reserve funds from gross income be allowed for the years 1917, 1918, and 1920, plaintiff's income-tax liability for said years would be as follows:

For the year 1917, $4,527.56, or $739.61 less than the income tax paid by plaintiff.

For the year 1918, $2,865.01, or $2,196.10 less than the income tax paid by plaintiff.

For the year 1920, nothing, or $1,654.19 less than the tax and penalty paid by plaintiff.

XIV. The plaintiff's said protests and its claims for refund of income tax for the years 1917, 1918, and 1920 were based on the ground, among others, that it was entitled to have the net additions required by law to be made to its deferred dividend reserve funds deducted from its gross income in computing its net taxable income for said years, and that the Commissioner of Internal Revenue erred in his failure and refusal to allow such deductions.

XV. For the year beginning July 1, 1918, the Commissioner of Internal Revenue assessed against the plaintiff a capital-stock tax of $425.00, which plaintiff paid on July 2, 1921. Thereafter said commissioner assessed against the plaintiff an additional capital-stock tax of $290.00 for said year, with a penalty thereon of $14.50, which tax and penalty were paid by plaintiff, under written protest, December 21, 1922, being a total payment of $729.50 capital-stock tax and penalty for said year.

On June 8, 1925, the plaintiff filed with said commissioner a claim for refund of the said capital-stock tax and penalty paid by it for said year beginning July 1, 1918, which claim was disallowed by the commissioner December 17, 1925.

XVI. For the year beginning July 1, 1919, the Commissioner of Internal Revenue assessed against the plaintiff a capital-stock tax of $434.00, which plaintiff paid on November 1, 1919. Thereafter said commissioner assessed against the plaintiff for said year an additional capital-stock tax of $295.00, with a penalty thereon of $14.75, which tax and

penalty were paid by plaintiff, under written protest, December 21, 1922, making a total of $743.75 capital-stock tax and penalty paid by plaintiff for said year beginning July 1, 1919.

On June 8, 1925, the plaintiff filed with said commissioner a claim for refund of the said capital-stock tax and penalty paid by it for the year beginning July 1, 1919, which claim was disallowed by the commissioner December 17, 1925.

XVII. For the year beginning July 1, 1921, the Commissioner of Internal Revenue assessed against the plaintiff a capital-stock tax of $447.00, which was paid by plaintiff August 6, 1921. Thereafter said commissioner assessed an additional capital-stock tax of $328.00 against the plaintiff for said year, with a penalty of $16.40 thereon, which tax and penalty were paid by plaintiff, under written protest, December 21, 1922, making a total of $791.40 paid by plaintiff for capital-stock tax and penalty thereon for said year beginning July 1, 1921.

On August 11, 1925, the plaintiff filed with said commissioner a claim for refund of the said capital-stock tax and penalty thereon paid by it for the year beginning July 1, 1921, which claim was disallowed by the commissioner December 17, 1925.

XVIII. In the computation by the Commissioner of Internal Revenue of the plaintiff's said capital-stock tax for the years beginning July 1, 1918, July 1, 1919, and July 1, 1921, and in his consideration and disallowance of the plaintiff's claims for refund of said taxes, the commissioner failed and refused to consider and treat as reserve funds required by law the net additions to which were not legally included in net income the reserve funds maintained by plaintiff on account of deferred dividends, as required by the laws of Minnesota and other States, but included said deferred dividend reserve funds in the amounts subject to capital-stock tax, which action by the commissioner resulted in the payment by the plaintiff of the capital-stock taxes sought to be recovered in this suit.

The amount of said deferred dividend reserve funds for each of said capital-stock tax years was as follows:

For the year beginning July 1, 1918, $154,517.55.

For the year beginning July 1, 1919, $172,818.39.

For the year beginning July 1, 1921, $221,496.79.

If said deferred dividend reserve funds had been treated by the commissioner as, and included in, reserve funds required by law the net additions to which are not legally included in the net income subject to income tax, then plaintiff's capital-stock taxes for said years would have been as follows:

For the year beginning July 1, 1918, $561.00, with penalty of $6.80, or $161.70 less than the tax and penalty paid by plaintiff.

For the year beginning July 1, 1919, $557.00, with penalty of $6.15, or $180.60 less than the tax and penalty paid by plaintiff.

For the year beginning July 1, 1921, $554.00, with penalty of $5.35, or $232.05 less than the tax and penalty paid by plaintiff.

XIX. The plaintiff's said protests against, and claims for refund of, said capital-stock taxes paid by it for said years were based upon the ground, among others, that it was entitled, in the computation of said taxes, to have its said deferred dividend reserve funds treated as reserve funds required by law the net additions to which were not legally included in net income; and that the commissioner erroneously failed and refused to so treat them, and, instead, included them in the amounts subject to capital-stock tax.

XX. During the years 1916 to 1921, inclusive, the insurance laws of the State of Minnesota contained the following provisions relative to the transaction of life insurance business in said State and the maintenance of deferred dividend reserve funds by insurance companies transacting such business therein:

"Every life insurance company doing business in this State conducted on the mutual plan or in which policyholders are entitled to share in the profits or surplus shall on all policies of life insurance heretofore issued, under the

conditions of which the distribution of surplus is deferred to a fixed or specified time, and contingent upon the policy being in force and the insured living at that time, annually ascertain the amount of surplus to which all such policies as a separate class are entitled, and shall annually apportion to such policies as a class the amount of surplus so ascertained, and carry the amount of such apportioned surplus, plus the actual interest earnings and accretions of such fund, as a distinct and separate liability to such class of policies on and for which the same was accumulated, and no company or any of its officers shall be permitted to use any part of such apportioned surplus fund for any purpose whatsoever other than for the express purpose for which the same was accumulated." (Section 1, chapter 201, Minnesota 1907 Laws, now section 3497, Revised Laws of Minnesota.)

XXI. During the years involved in this suit the Insurance Department of Minnesota required the plaintiff and all other life-insurance companies doing business in Minnesota to maintain deferred dividend reserve funds on account of their apportioned and accumulated deferred dividends under their deferred-dividend policies, on the ground that such reserve funds were required by the laws of said State.

Plaintiff was also required by the State Insurance Department of Nebraska, North Dakota, and other States, to set aside and maintain deferred dividend reserve funds.

It was the practice of the Insurance Department of Minnesota during the years involved in this suit to require all life-insurance companies transacting business in said State to set aside and maintain reserve funds sufficient to cover their deferred dividends and accumulations thereon; and it was the general understanding of the Minnesota Insurance Department, and the life-insurance companies transacting insurance business in Minnesota, and also of others concerned in the question, that such deferred dividend reserve funds were reserve funds required by the provisions of the Minnesota insurance law to be maintained by such insurance companies, and that the net additions thereto were net additions required to be made by said laws.

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XXII. The amounts of the deferred dividends ascertained and held by plaintiff at the end of the respective years 1916 to 1920, inclusive, were credited to plaintiff's deferred dividend policyholders as a group or class, and payment to the individual deferred dividend policyholder was contingent upon his being alive and his policy in force at the end of the tontine period, at which time the entire amount of deferred dividends and accumulations thereon for any group or class of deferred-dividend policyholders is distributable to said surviving policyholders whose policies are then in effect.

XXIII. Plaintiff in ascertaining the dividend rate applicable to its deferred-dividend policies for the respective years 1916 to 1920, inclusive, took into consideration the surplus and earnings of the company, the market value of the company's securities and other assets, the general condition of the company, and the probability of future epidemics.

XXIV. The amounts ascertained and held by plaintiff as deferred dividends at the end of each of the respective years 1916 to 1920, inclusive, represent the refund of premium overcharges for the current policy year, and in determining the amounts of such overcharges consideration is given to the loading on the premium, less the expense charge, gain from mortality and gain from interest.

XXV. The amounts ascertained and held by plaintiff as deferred dividends at the end of each of the respective years 1916 to 1920, inclusive, were not paid by plaintiff to its deferred-dividend policyholders in the year in which ascertained, but were paid in the succeeding years to such policyholders as were entitled thereto when the distribution period for such dividends arrived, as provided by their respective policies.

The court decided that plaintiff was entitled to recover the sum of $4,435.64, set forth in Finding IV, with interest. As to other items the petition was dismissed.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff company is a Minnesota corporation, a mutual life insurance company, conducting its business on

the mutual level premium plan. Recovery is sought in this case of excess-profits taxes for 1917 in the amount of $4,435.64; income taxes for the years 1917, 1918, and 1920 in the amount of $4,209.70, and capital-stock taxes for the periods beginning July 1, 1918, July 1, 1919, and July 1, 1921, in the amount of $592.65. Sums in excess of the above amounts are claimed in the petition. The amounts stated are taken from plaintiff's brief.

Excess-profits taxes for 1917.—The plaintiff company is not a capital-stock corporation. Its net income for 1917 was $92,221.79. Under section 207 of the revenue act of October 3, 1917 (chap. 63, 40 Stat. 300), plaintiff was entitled to a deduction from its net income of 9% of its invested capital in computing excess-profits taxes. The commissioner allowed as deductible reserve funds, required by law, at the close of 1916, the sum of $4,374,834.64. The record discloses that at least $2,554,794.50 of the latter sum is made up of premium payments paid in for insurance policies. The case of *Duffy* v. *Mutual Benefit Life Insurance Co.*, 272 U. S. 613, decided that premium payments received as these were should be included in invested capital. Therefore, it is apparent that in this instance the increase in the company's invested capital by the amount of premium payments precludes the assessment of excess profits for the year involved. The defendant concedes the fact. The item, except as to the sum of $1,129.39, is contested upon the grounds of the statute of limitations. The facts are as follows: On June 17, 1918, plaintiff paid as profits tax for 1917, $4,319.00; on July 25, 1918, plaintiff filed a claim for refund of the tax, predicating its claim upon a failure of the commissioner to include certain sums in its reserve funds required by law in his computation for the ascertainment of invested capital. On May 5, 1921, the plaintiff, at the request of the commissioner, filed an unlimited waiver of all statutory limitations. On June 7, 1921, the refund claim of July 25, 1918, was denied. Thereafter, on November 16, 1921, the commissioner assessed an additional profits tax of $116.64 against the plaintiff. On April 4, 1925, the plain-

tiff filed a claim for the refund of all taxes, both the original and additional assessments of profits tax. On July 31, 1925, the refund claim was again denied and this suit instituted February 11, 1926. The issue is the result of the commissioner's mimeograph #3085 dated April 11, 1923, terminating all 1917 unlimited waivers on April 1, 1924, a ruling the commissioner asserts was compulsory under the statute limiting the filing of claims to April 1, 1924. As soon as the plaintiff learned of the above action plaintiff filed with the commissioner, on May 21, 1925, an extension of its unlimited waiver of May 5, 1921, dating the same April 30, 1925, to extend for one year from April 30, 1925.

The plaintiff's first refund claim was filed July 25, 1918, seeking a refund of the excess-profits tax paid June 17, 1918. Before this claim was denied the commissioner requested of the plaintiff the filing of an unlimited waiver of all statutory limitations and the plaintiff complied with the request on May 5, 1921, nearly three years after the refund claim. Thereafter on June 7, 1921, the pending refund claim was denied. Subsequently, on November 16, 1921, the commissioner assessed additional excess-profits taxes to the amount of $116.64. At this point in the proceedings there was manifestly nothing in the way of an additional refund claim upon the part of the plaintiff for a refund of the excess-profits tax. True, the original refund claim had been denied, but the commissioner afforded an opportunity for an additional refund claim, and as the taxes were identical in character the refund of the additional tax would necessarily carry with it all of the tax. No limitation had intervened to prevent either the refund of the tax or the assessment of additional taxes, and even if it had the commissioner was fortified with an unlimited waiver. The commissioner on April 11, 1923, issued his mimeograph #3085 terminating all unlimited waivers as of April 1, 1924. The commissioner justified this action under section 252 of the revenue act of 1921 (42 Stat. 268), providing as follows:

"That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1916, as amended, the Revenue Act of 1917, * * * it appears that an amount of income, war-profits, or excess-profits tax has

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been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *."

Evidently this remedial legislation was enacted to afford the taxpayer a right which he did not possess under existing law and to empower the commissioner to grant the same. The plaintiff had filed a refund claim within the five-year period, and a reconsideration of the same would have been a legal procedure, but aside from this fact Congress amended section 252 of the act of 1921 on March 4, 1923 (42 Stat. 1504–1505), by providing as follows:

"That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1916, as amended, the Revenue Act of 1917, * * * it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, or unless before the expiration of two years from the time the tax was paid a claim therefor is filed by the taxpayer: *Provided further*, That if the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, such credit or refund shall be allowed or made if claim therefor is filed either within six years from the time the return for such taxable year 1917 was due or within two years from the time the tax was paid: * * *."

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By the terms of this statute plaintiff's right to file a claim was extended to six years from the time the return was due, and in addition thereto waivers were recognized. The plaintiff's waiver was unlimited. Without repeating *in haec verba* the subsequent legislation affecting the issue, we think it sufficient to observe that by the amendatory acts of 1924 (43 Stat. 302), the act of 1925 (43 Stat. 1115), and the act of 1926 (44 Stat. 66–68), the pertinent parts of which we set forth in an appendix to this opinion, it is clear that Congress was intent upon enabling taxpayers, who came within the terms of the statute, to obtain refunds if a claim for refund had been filed on or before April 1, 1926. We are unable to perceive any other construction of the acts. A taxpayer affected by its terms, having observed the proceedings enumerated in the law, was granted the additional privilege of claiming a refund up to the dates mentioned in the laws. The defendant would deny plaintiff relief in part upon the theory that its original return due April 1, 1918, extended to the plaintiff the single right to file a refund claim to April 1, 1924, i. e., six years under the act of March 4, 1923 (*supra*), at the same time conceding that the refund claim of the plaintiff filed April 4, 1925, is sufficient under the laws to entitle the plaintiff to recover $1,129.39 additional income and excess-profits taxes collected November 16, 1921. We think otherwise. Addressing attention to, but without now deciding the doubtful right of the commissioner by an ex parte proceeding, and without notice to a taxpayer bound by the same to terminate an unlimited waiver of the statute of limitations, we think the laws by express terms accorded the plaintiff the right to proceed as it did proceed. Obviously but for the action of the commissioner in seeking to terminate unlimited waivers, the plaintiff is entitled to relief. The defendant seemingly concedes the fact. Therefore it would be difficult to hold that Congress was intending to preclude the consideration of just claims to refund taxes illegally exacted when but for an administrative order of the bureau the taxpayer would be clearly entitled to recover. The taxes for 1917 were taxes which accrued during the war. The bureau and the taxpayer were affected by existing con-

ditions at the time the returns were made, and Congress, in enacting the various remedial amendments extending the time for refund claims and adjustments, clearly recognized the existence of a substantial right, and precludes resort to a strict technical construction of the statutes.

The findings, due to an indispensable array of figures, are more or less perplexing. The court has simplified them as much as possible. The necessity for their length is due to requests under the rule made before trial for findings which the parties deemed essential. The issue with respect to the remaining items of the suit is narrowed to a single controversy, one quite involved and not without apparent difficulties. The commissioner in computing the plaintiff's income and capital-stock taxes for the years stated in the findings refused to allow as a deduction from plaintiff's gross income the net additions to its deferred dividend reserves, a reserve maintained by the plaintiff and required by the law of Minnesota.

The revenue act of 1918 (40 Stat. 1079) provides as follows:

"(a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

"(10) In the case of insurance companies, in addition to the above: (a) The net addition required by law to be made within the taxable year to reserve funds * * * ; and (b) the sums other than dividends paid within the taxable year on policy and annuity contracts."

We quote this section inasmuch as it is in effect a reenactment of the same section of the revenue act of 1916 (39 Stat. 767).

Insurance companies, both fire and life, have been many times before the courts contending for a deduction of net additions to reserve funds required by law from their gross income in computing the net income of the company. The general insistence is not a new one. The novelty of the present contention is due wholly to the character of the reserves involved herein. A review of the many cases cited in the briefs puts at rest certain fundamental principles

by which the subject is to be approached and applicable in ascertaining the intention of the Congress in enacting the provision of law. First: It is established by judicial precedent that Congress was dealing with the isolated subject of insurance, and in employing the term "reserve" the intention was to attach to it the special and technical meaning it has in the law of insurance. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 350; *Fry* v. *Provident Savings Life Assurance Society*, 38 S. W. 116; *Fink* v. *Northwestern Mutual Life Insurance Co.*, 267 Fed. 968, 973. Second: It seems clear from decided cases that the enactment of a State law or the promulgation of requirements by a State insurance commissioner under a State statute is not sufficient of itself to authorize the commissioner to make deductions of all character of net additions to reserve funds upon this single basis. *McCoach* v. *Insurance Co. of North America*, 244 U. S. 585. In the case of *United States* v. *Boston Insurance Co.*, 269 U. S. 197, 202, the Supreme Court said:

"It follows from *McCoach* v. *Insurance Co.* that the permitted deductions specified by section 12, act of 1916, do not necessarily include anything which may be denominated 'reserve fund' by State statute or officer."

The plaintiff conducts its business on the mutual level premium plan. The surplus of the company, which forms the fund from which profit accrues to the policyholders of designated classes who survive the period of maturity, is accumulated by the difference between the sum of the actual premium annually paid in and the expense of conducting the business of the company. This fund, augmented by accretions from investments made thereof, constitutes the assets of the company, which by the terms of the policies issued, accords the insured the right of participation therein if he lives long enough to mature his policy, usually from ten to fifteen, or twenty years. As said by the Supreme Court in *Penn Mutual Life Insurance Co.* v. *Lederer*, 252 U. S. 523, 531:

"But in level-premium life insurance, while the motive for taking it may be mainly protection, the business is largely that of savings investment. The premium is in the nature

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of a savings deposit. Except where there are stockholders, the savings bank pays back to the depositor his deposit with the interest earned less the necessary expense of management. The insurance company does the same, the difference being merely that the savings bank undertakes to repay to each individual depositor the whole of his deposit with interest; while the life insurance company undertakes to pay to each member of a class the average amount (regarding the chances of life and death); so that those who do not reach the average age get more than they have deposited; that is, paid-in premiums (including interest) and those who exceed the average age less than they deposited (including interest). The dividend of a life-insurance company may be regarded as paying back part of these deposits called premiums. The dividend is made possible because the amounts paid in as premium have earned more than it was assumed they would when the policy contract was made, or because the expense of conducting the business was less than it was then assumed it would be or because the mortality—that is, the deaths in the class to which the policyholder belongs—proved to be less than had then been assumed in fixing the premium rate. * * * But after the policy is paid up, the element of investment predominates and Congress might reasonably regard the dividend substantially as profit on the investment."

As a matter of fact, the surplus is the single asset of a noncapital stock company from which the tontine policyholders derive a profit in the way of dividends. The payment of deferred dividends depends upon the state of the company's affairs during the annual period of their accumulation, the business sagacity exhibited in financial management, the state of the investment market, and a variety of factors always present in the conduct of the business, so that in so far as State legislatures compel reserves to prevent diversions or unwise uses of the surplus fund, the restraint is manifestly directed toward the solvency of the company, an assurance to policyholders of payment of dividends, rather than the universal reserve recognized in the insurance business as essential to protect contingent liabilities to policyholders. That the surplus is essentially income to the corporation, as distinct from the expense of operation and other policy obligations, is apparent, and originally the com-

panies were not required to reserve against deferred dividend payments. The plaintiff recites in its brief the cause for such legislation, attributing its origin in part at least to the misuse of the surplus and its depletion through diversion to purposes inimical to the interests of policyholders.

In *New York Life Insurance Co.* v. *Edwards*, 271 U. S. 109, the Supreme Court again applied the principles of the *McCoach* and *Boston Insurance Company cases.* On page 116 of the opinion the court said:

"Overpayments by deferred dividend policyholders for 1912 amounted to $8,198,918.00. The collector refused to deduct this sum from the total receipts and demanded the prescribed tax of one per centum thereon. We think he acted properly. Both courts below so held.

"The applicable doctrine was much considered in *Penn Mutual Life Insurance Co.* v. *Lederer*, 252 U. S. 523. We there pointed out the probable reason for the permitted non-inclusion in the net income of a life insurance company of 'such portion of any actual premium received from any individual policyholder, as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year.' Here it is insisted that within the meaning of the quoted provision each deferred dividend policyholder's overpayment was actually credited to him during the year; but we can not accept this theory. The aggregate of all such payments was held for distribution among policyholders alive at the end of the period. The receipts for the year were not really diminished."

While both the *Penn Mutual* and the *Edwards cases* did not involve the issue of "net additions to reserve funds required by law," we abstract from the opinions the governing principle that the purpose of Congress in the taxing act was to restrict the allowable deductions to the class of reserves required "as against the contingent liability on outstanding policies." Deferred dividends, as the term imports, are retained by the company for years. The question of an annual allocation of deferred dividends is contingent upon the prosperity of the company, and the statutory requirement as to a reserve against the liability is, it

seems to us, no more than a wholesome provision that the stated annual financial condition of the company in this respect shall be maintained.

In view of the cases which have been decided, we think the petition as to those items of the claim must be dismissed. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

APPENDIX

AMENDATORY ACTS

Revenue act of 1924:

"SEC. 281 (e). If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid." (43 Stat. 302.)

Revenue act of 1925:

"That subdivision (e) of section 281 of the revenue act of 1924 is amended by adding thereto two new sentences to read as follows: 'If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April

1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919.'" (43 Stat. 1115.)

Revenue act of 1926:

"SEC. 284 (g). If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if the claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d)." (44 Stat. 66–68.)

EMILY G. HAMLIN, AS ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF GRACE ENOS HAMLIN, DECEASED, v. THE UNITED STATES

[No. D-877. Decided December 3, 1928]

On the Proofs

Estate-transfer tax; power of appointment by will; termination of trust after appointee's death.—A testator, citizen and resident of the State of New York, having in his will directed that the principal sum remaining in his estate after execution of a trust be divided and distributed in proportions specified to certain devisees or legatees, the distribution as to a particular devisee or legatee was defeated by death prior to the time for division and distribution. The power given in said will to said devisee or legatee to appoint by will "to whom upon the termination of the trust the principal sum distributable to him if living shall be paid and distributed in case of his decease," gave the appointee's devisee or legatee no estate subject upon the latter's death to the Federal estate-transfer tax.

The Reporter's statement of the case:

Mr. John Lord O'Brian for the plaintiff. *Mr. Ralph Ulsh* and *Slee, O'Brian, Hellings & Ulsh* were on the brief.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Cicero J. Hamlin, formerly of Buffalo, New York, died at Buffalo, New York, a citizen and resident of said city and State, on February 20, 1905, leaving a last will and testament dated September 25, 1899, which was duly admitted to probate by the surrogate of Erie County, New York, having jurisdiction, on February 23, 1905. A copy of said will of Cicero J. Hamlin, deceased, marked "Exhibit A," is attached to the petition and is made a part of this finding by reference.

II. Cicero J. Hamlin, deceased, left surviving him Susan A. Hamlin, his widow, and three sons, Frank Hamlin, William Hamlin, and Harry Hamlin, his only heirs at law and next of kin.

III. Harry Hamlin, one of the sons of said Cicero J. Hamlin, deceased, died on June 3, 1907, a citizen and resident of Buffalo, New York, leaving a last will and testament dated June 1, 1907, which was duly admitted to probate by the surrogate of Erie County, New York, having jurisdiction, on June 6, 1907.

IV. A copy of said will of Harry Hamlin, deceased, marked "Exhibit B," is attached to the petition and is made a part of this finding by reference.

V. Harry Hamlin, deceased, left surviving him Grace Enos Hamlin, his widow, and one son, Chauncey Jerome Hamlin, his only heir at law and next of kin. Grace Enos Hamlin, widow of Harry Hamlin, deceased, died a resident and citizen of Buffalo, New York, on June 17, 1918, leaving a last will and testament dated June 7, 1907, which was duly admitted to probate by the surrogate of Erie County, New York, having jurisdiction, on July 3, 1918.

A copy of said will of Grace Enos Hamlin, deceased, marked "Exhibit C," is attached to the petition and made a part of this finding by reference.

Grace Enos Hamlin, deceased, left her surviving one son, said Chauncey Jerome Hamlin, her only heir at law and next of kin.

VI. Plaintiff, Emily G. Hamlin, is the administratrix with the will annexed of the estate of said Grace Enos Hamlin, deceased, duly appointed by the surrogate of Erie County, New York, having jurisdiction, on July 3, 1918.

VII. Susan A. Hamlin, widow of said Cicero J. Hamlin, deceased, predeceased said Grace Enos Hamlin, but said Frank Hamlin, one of the sons of said Cicero J. Hamlin, deceased, survived said Grace Enos Hamlin and is now living. Said trust estate created under the will of said Cicero J. Hamlin, deceased, has not been terminated, and no part of the principal thereof ever came into the control or possession of the said Harry Hamlin or the said Grace Enos Hamlin.

Reporter's Statement of the Case

VIII. On or about May 16, 1919, plaintiff prepared and filed with the United States collector of internal revenue at Buffalo, New York, a return in the form prescribed by the Commissioner of Internal Revenue purporting to show the value of the gross and net estates of the said Grace Enos Hamlin as required by Title II of the revenue act of 1916, as amended by the act of March 3, 1917, and by the revenue act of 1917. Because the rulings and regulations made and issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury so required, plaintiff included in computing the value of the gross estate of the said decedent the value of one-fifteenth interest in the estate of the said Cicero J. Hamlin, deceased, computed at the sum of $182,313.65. The value of the net estate of the said Grace Enos Hamlin, deceased, reported in said return, including value of the said interest in the estate of Cicero J. Hamlin, deceased, was $477,180.26, and the total tax, as computed thereon, amounted to the sum of $29,718.03; on December 8, 1919, plaintiff paid to the United States, through the collector of internal revenue at the city of Buffalo, New York, the sum of $29,718.03, but such payment was made with respect to the part thereof arising by reason of the inclusion of the value of the aforesaid interest in the estate of Cicero J. Hamlin, deceased, because of the said rulings and regulations, and solely for the purpose of avoiding claims for penalties for nonpayment thereof and under protest that the said interest in the estate of Cicero J. Hamlin, deceased, was not a part of the taxable estate of Grace Enos Hamlin, deceased.

IX. Thereafter and in the early part of the year 1921 the Commissioner of Internal Revenue, upon audit and review of the aforesaid return filed by plaintiff and upon other information obtained by him, determined that the value of the net estate of Grace Enos Hamlin, deceased, was $525,315.62, and that the value of the said interest in the estate of Cicero J. Hamlin, deceased, was $181,612.40. The amount of the Federal estate tax upon the transfer of the net estate of the said Grace Enos Hamlin, deceased, was determined by the Commissioner of Internal Revenue to be

Reporter's Statement of the Case

$34,531.56. Demand was made by the United States collector of internal revenue upon plaintiff for the payment of the sum of $4,813.53 as an additional Federal estate tax upon the transfer of the net estate of Grace Enos Hamlin, deceased, over and above the sum of $29,718.03 theretofore paid. Under said demand and the aforesaid rulings and regulations, and solely for the purpose of avoiding claims for penalties plaintiff on October 8, 1921, paid to the United States through the collector of internal revenue at the city of Buffalo, New York, the said additional tax amounting to $4,813.53, but under protest that the same was not owing or legally demanded or collected because the said sum of $181,612.40 was unlawfully included in the net estate of the said Grace Enos Hamlin.

X. The said Federal estate tax, upon the transfer of the net estate of Grace Enos Hamlin, deceased, was exacted and paid under Title II of the act of September 8, 1916, chap. 463, as amended by the act of March 3, 1917, chap. 159, 39 Stat. 777; 39 Stat. 1000, 1002.

XI. The claim of the plaintiff is that the true and lawful value of the net estate and the amount of the tax upon the transfer of the net estate of said Grace Enos Hamlin, deceased, and the correct computation thereof, are as follows:

Amount of net estate according to determination on review		$525, 315. 62
Value of a one-fifteenth interest in Cicero J. Hamlin's estate as corrected		181, 612. 40
Correct value of net estate after deducting value of a one-fifteenth interest in Cicero J. Hamlin's estate		343, 703. 22
$50,000 at 2% equals	$1, 000. 00	
100,000 at 4% equals	4, 000. 00	
100,000 at 6% equals	6, 000. 00	
93,703.22 at 8% equals	7, 496. 26	
Correct total tax		18, 496. 26
Amount of tax paid	34, 531. 56	
Correct tax	18, 496. 26	
Amount of refund due claimant		-16, 035. 30

XII. On or about October 8, 1921, plaintiff duly filed with the United States Commissioner of Internal Revenue

through the collector of internal revenue at Buffalo, New York, a claim for the refund of the said sum of $16,035.30 upon the ground that no part of the value of the said interest in the estate of Cicero J. Hamlin, deceased, should be included in the value of the gross estate of Grace Enos Hamlin, deceased. Said claim was duly considered by the Commissioner of Internal Revenue, and on or about January 25, 1922, said claim was wholly denied.

XIII. Plaintiff is a citizen of the United States and resides in the city of Buffalo, Erie County, New York.

The court decided that plaintiff was entitled to recover $16,035.30, with interest upon $4,813.53 from October 8, 1921, and upon $11,221.77 from December 8, 1919.

Moss, *Judge*, delivered the opinion of the court:

The facts in this case have been stipulated and may briefly be stated as follows: Cicero J. Hamlin, a resident of Buffalo, New York, died on February 20, 1905, leaving a last will and testament, a copy of which is attached to the petition as "Exhibit A." By the terms of this instrument the testator, after making certain specific bequests and devises, left his residuary estate to his three sons, Frank Hamlin, William Hamlin, and Harry Hamlin, whom he named as executors and trustees, to have and to hold same during the life of his wife, Susan A. Hamlin, and of his son, Frank Hamlin, with direction and authority to hold, convert, invest, and reinvest same, and to collect and distribute the income therefrom as provided in the will, and upon the death of both the wife and the son to distribute the principal of the estate to the issue of Frank Hamlin forty per cent, and to William Hamlin and Harry Hamlin each thirty per cent thereof. It was provided in said instrument that the testator's wife should be paid an annuity of $18,000, and that each of the three sons should receive $10,000 per annum for his services as executor and trustee until the termination of the trust. The will contained the further provision "* * * either of my sons shall be authorized to appoint and direct in and by his last will and testament to whom and in what manner the proportion of such compensation and of the income dis-

tributable to him pending the execution of the trust shall be paid and distributed after his decease, and to whom upon the termination of the trust the principal sum distributable to him if living shall be paid and distributed in case of his decease."

On June 3, 1907, Harry Hamlin died, leaving a last will and testament, by the terms of which he devised and bequeathed to his wife and to his son, Chauncey Jerome Hamlin, "All of the rest, residue, and remainder of my estate, including the share and portion of the estate of my father, Cicero J. Hamlin, in which I take or may be entitled to under his last will and testament and after the satisfaction of said bequest and the payment of my debts and expenses and the expenses of administration upon my estate, I give, devise, and bequeath unto my said wife, Grace Enos Hamlin, and my said son, Chauncey Jerome Hamlin, to be equally divided between them, share and share alike. * * *." A copy of said will is attached to the petition as "Exhibit B."

Grace Enos Hamlin, the wife of Harry Hamlin, died a citizen and resident of the State of New York on June 17, 1918, leaving a last will and testament, by the terms of which she devised and bequeathed her entire estate to her son, Chauncey Jerome Hamlin, without specific mention of any interest in the estate of Cicero J. Hamlin.

Susan A. Hamlin, the wife of Cicero J. Hamlin, died prior to the death of Grace Enos Hamlin, but Frank Hamlin survived the said Grace Enos Hamlin and was still living at the time of the institution of this suit.

In computing the transfer tax on the estate of Grace Enos Hamlin, the defendant included the value of the alleged interest of Grace Enos Hamlin in the estate of Cicero J. Hamlin, fixing same at $181,612.40. The tax on it, amounting to $16,035.30, was paid. A claim for refund was thereafter filed with the Commissioner of Internal Revenue and was rejected. This action by the administratrix of the estate of Grace Enos Hamlin is for the recovery of said amount.

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The tax involved herein was assessed and collected under the provisions of the revenue act of 1916, 39 Stat. 777, the pertinent portions of which are as follows:

"SECTION 201. That a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States. * * *

"SECTION 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated;

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." * * *

The question for determination is whether or not Grace Enos Hamlin at the time of her death had an interest in the estate of Cicero J. Hamlin which was subject to the payment of charges against her estate and of the expenses of its administration and subject to distribution as part of her estate. Did her interest in the estate of Cicero J. Hamlin under the will of her husband, Harry Hamlin, survive her death? And this question is to be determined by the law of the State of New York. *Pennsylvania Co.* v. *Lederer*, 292 Fed. 629.

It is the contention of defendant that Grace Enos Hamlin, by the will of her husband, took a vested interest in the portion of the trust estate which he attempted to transfer to her. We are unable to agree with that contention. In the case of *Dougherty* v. *Thompson*, 167 N. Y. 472, the correct principle for the construction of a will of this character is announced in the following language: "The intention is the paramount rule of construction. Most of the other rules are aids to the discovery of the testator's intention or to the application of it. One of the subordinate rules is that when the only gift is found in the *direction to pay or distribute at*

a future time, the gift is future and not immediate; contingent but not vested. Its reason is plain; the direction has no reference to the present and can be executed only in the future, and if in the meantime the donee indicated shall die, the direction can not be executed at all." (Our italics.) See also, in *Matter of Bostwick*, 236 N. Y. 242, and *Wright* v. *Wright*, 225 N. Y. 329.

The prime purpose of the testator, Cicero J. Hamlin, after providing for the annuity to his wife, was to make suitable provision for his son, Frank, who was practically blind, and in a substantial measure incapacitated by reason thereof from earning a livelihood. It is provided in the will "In case such net income shall be insufficient to pay and discharge the said annuity and to pay in full the said salaries of my said sons, then I direct that sufficient thereof or if necessary of the *principal of my estate be distributed to my son, Frank Hamlin*, to make good to him *in any event* the salary hereinbefore specified." And the testator added, "The reasons for making this provision are fully understood by all my sons." The will of Cicero J. Hamlin made no disposition of the principal of the estate until the termination of the trust. It merely directed the disposition of the income during the lives of the testator's wife and his son, Frank. The language of the will in disposing of the principal is very clear. It states: "Upon the decease of both my wife and my son, Frank Hamlin, I direct that said principal sum *then remaining in the hands of my said executors and trustees, and any accumulations thereon, be divided and distributed by my said executors and trustees* as follows: To the issue of my son, Frank Hamlin, forty per cent thereof; and to my said sons, William Hamlin and Harry Hamlin, each thirty per cent thereof." These are the only words of testamentary disposition contained in the will, and applying the principle announced in the cases above cited, any interest passing under such a will would be defeated by the death of the devisee or legatee prior to the time for division and distribution. Grace Enos Hamlin could take no greater estate under the appointment by the will of her husband Harry than he himself held under the

will of his father. The only power conferred by the father's will was the authority to appoint, by will, the person to whom "Upon the termination of the trust the principal sum distributable to him if living shall be paid and distributed in case of his decease." The interest of Harry Hamlin was conditioned upon his surviving the administration of the trust, and was defeated by his death prior to that event. The same condition of survivorship would necessarily attach to the interest of Grace Enos Hamlin under the appointment by her husband's will. It will be noted that there was no provision in the will of Cicero J. Hamlin for a substitution of beneficiaries in the division and distribution of the principal of the estate. It was provided that in case either of the sons should die prior to the termination of the trust, leaving issue, the salary provided for the son dying should, subject to the power of appointment, be continued and paid to his issue until the distribution of the estate at the termination of the trust. But the testamentary disposition of the principal is direct and specific "to the issue of my son, Frank Hamlin, forty per cent and to my said sons, William Hamlin and Harry Hamlin, each thirty per cent," same to be *divided* and *distributed* upon the death of both the wife and son Frank.

At the death of Grace Enos Hamlin June 17, 1918, and when this suit was instituted, November 28, 1924, Frank Hamlin, whose death will terminate the trust, was still living, and the trust fund was still in the hands of the executors and trustees, with the right to use the principal of the estate, if necessary, for the benefit of Frank Hamlin. Grace Enos Hamlin had at no time the right to the possession, use, or enjoyment of any part of the estate of Cicero J. Hamlin, nor was any part of it subject to the payment of charges against her estate, or the expense of administration, nor was it subject to distribution as part of her estate. Plaintiff is entitled to recover, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

COLGATE & COMPANY v. THE UNITED STATES

[No. F-101. Decided December 3, 1928]

On the Proofs

Excise tax; jewelry exchanged for soap coupons; regulation of Commissioner of Internal Revenue.—The excise tax upon jewelry "sold by or for a dealer or his estate for consumption or use," equivalent to 5 per cent "of the price for which so sold," provided by sections 905 and 905 (a) of the revenue acts of 1918 and 1921, respectively, applies to jewelry extensively exchanged by a manufacturer of soap for coupons issued therewith, notwithstanding he did not retail the soap direct to the consumer, sell the jewelry for a separate price, or deal in jewelry except as an inducement to the purchase of soap, and a manufacturer of soap who so conducts his business is a dealer in jewelry within the meaning of the statute. A regulation by the Commissioner of Internal Revenue under which he calculated the excise tax upon the fair market value of the jewelry at the time it was exchanged for the coupons, as representing the sale price, was authorized and enforceable.

The Reporter's statement of the case:

Messrs. M. Carter Hall and *Edward F. Spitz* for the plaintiff. *Mr. Mason Trowbridge* and *Carlin, Carlin & Hall* were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. At all times herein mentioned, plaintiff was, and still is, a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business and office at No. 105 Hudson Street, Jersey City, State of New Jersey, engaged in the manufacture of soaps, washing powders, and other products for laundry and toilet uses, and the vending thereof, at wholesale, in intrastate, interstate, and foreign commerce, and including the exchanging of various articles of merchandise for coupons as hereinafter set forth.

II. Plaintiff, on various dates between November 1, 1920, and July 2, 1924, in the regular and ordinary course of its business, delivered and shipped to divers persons in the United States and foreign countries, various articles of merchandise in exchange for coupons, which had been previously issued by it as a part of the wrappers or containers of laundry and toilet soaps, and washing powders, manufactured and sold by it, at wholesale; which said coupons entitled such persons to secure therewith various articles in accordance with the terms of a catalogue, also issued by plaintiff and more particularly hereinafter described.

III. Said coupons were issued by plaintiff prior to July 21, 1924, as follows:

Upon a conveniently sized portion of said wrappers or containers of said laundry and toilet soaps and washing powders, packed by plaintiff, appeared the name of said respective products in distinctive form or type; attached to the petition and market "Exhibit A" are coupons which during said period accompanied Octagon soap powder, Octagon soap, Octagon soap chips, Octagon white laundry soap, Octagon white floating soap, and Octagon scouring cleanser. Persons who purchased said products at retail from merchants who had procured said products at wholesale from plaintiff or its jobbers were apprised by a notice upon said wrapper or containers that portions thereof when cut therefrom would be exchanged for articles in accordance with the terms and conditions of a catalogue, a copy of which, said notice further recited, would be furnished upon request.

IV. A typical catalogue, in effect during the period between November 1, 1920, and July 2, 1924, is attached to the petition and marked "Exhibit B." The front page of said catalogue contains a notice of "How to get premiums," which refers to this explanation thereof, printed within:

"Save the premium coupons from Octagon soap, Octagon soap powder, Octagon scouring cleanser, Octagon white floating soap, Octagon white laundry soap, and Octagon soap chips. These coupons may be combined to obtain the same premium. No special combination or assortment of

coupons is required for any of the premiums illustrated in this folder.

"When you have enough coupons to obtain the premium, write on a full-size sheet of paper the *description* and *number* of the article you want, with your *full name and address.*

"Enclose coupons and letter in the same envelope and send by first-class mail; not parcel post. Address envelope plainly to COLGATE & COMPANY, 30 York Street, Jersey City, N. J."

V. During the period involved in this suit the plaintiff maintained, at an annual expense of $3,000 each, approximately 50 stores, each employing two clerks, where coupons could be presented and premiums claimed. In addition to this about 20 premium trucks belonging to the plaintiff operated throughout the country and within city streets redeeming coupon wrappers entitling the owners to premiums as stated in the catalogues. The total number of premium coupons redeemed each of the years in question were as follows:

1920	117, 323, 076
1921	146, 006, 791
1922	195, 885, 088
1923	222, 775, 948
1924	238, 923, 157

For each 100 coupons so redeemed plaintiff considered their value substantially on the unit basis of 100 or $1.00 and that there was an average outlay in redeeming every such block of 100 coupons of 81 cents, consisting of intrinsic merchandise cost for premiums of 51 cents, plus 30 cents additional representing cost of catalogues and all other direct premium expenses and a percentage of overhead attributable to its premium department.

In 1920 the plaintiff issued and used 2,470,000 catalogues for premium stores. In the same year 3,800,000 catalogues were used for mail premiums. In 1921, 2,750,000 catalogues were used for store catalogues and 3,800,000 for mail. In 1922, 4,300,000 were used for premium stores and 4,000,000 for mail. In 1923, 5,500,000 were used for stores and 5,000,000 for mail. In 1924, 6,700,000 were used for stores and 6,500,000 for mail.

Reporter's Statement of the Case

Prior to 1920 coupon brokers acquired coupons issued by the plaintiff to such an extent that plaintiff, with partial success, conducted a vigorous campaign against this brokerage business.

VI. In conformity with Article V of Regulations 48, promulgated by the Commissioner of Internal Revenue, the collector of internal revenue required plaintiff to make monthly returns under oath, as provided by section 905 of the revenue act of 1918 and 905 (b) of the revenue act of 1921, of all articles commonly or commercially known as jewelry as described in said sections 905 and 905 (a), delivered or shipped by plaintiff in exchange for its said coupons; and to pay the taxes imposed upon such articles under the provisions of said sections 905 and 905 (a), on account of the delivery or shipment by plaintiff of said articles commonly or commercially known as jewelry, in exchange or return for such coupons, as aforesaid, and were based on the fair market value of the articles of jewelry at the time they were exchanged for said coupons.

VII. With the selling price of such articles of jewelry determined at their fair market value when issued to redeem premium coupons, and with taxes computed at 5% of such selling price, the excise taxes of $16,944.22 were collected upon jewelry sold by plaintiff between December 27, 1920, and July 23, 1924, inclusive, at the aggregate price of $338,884.40.

VIII. The taxes paid by plaintiff during the period hereinbefore mentioned, to wit: between November 1, 1920, and July 2, 1924, pursuant to said regulation of the Commissioner of Internal Revenue, and as a result of said action of said collector of internal revenue, at Newark, N. J., were as follows:

Dec. 27, 1920, to July 23, 1924 .... $16,944.22

Plaintiff paid the aforesaid $16,944.22 of taxes during the aforesaid period extending from December 27, 1920, to July 23, 1924.

IX. On or about December 29, 1924, and before the expiration of four years from the respective payment dates of

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any of said taxes, except $268.92 paid December 27, 1920, plaintiff filed with the collector of internal revenue at Newark, N. J., a claim for refund of said sum of $16,944.22 collected as aforesaid for the said period from December 27, 1920, to July 23, 1924, said claim or refund being in all respects complete, regular, and in accordance with the law and regulations. Evidence was submitted in support of said claim for refund, and on or about January 7, 1926, the Commissioner of Internal Revenue rejected said claim for refund of said taxes in a letter addressed to plaintiff, which read as follows:

"Reference is made to your claim for refund of $16,944.22, representing miscellaneous excise taxes paid for the period November, 1920, to July, 1924, inclusive.

"It has been noted you contend that the amount claimed represents taxes erroneously paid on various articles of jewelry, fountain pens, and other articles ornamented and fitted with precious metals which were issued to purchasers in exchange for coupons and certificates given with each sale of merchandise.

"It has been held, however, that the above-mentioned articles given in exchange for coupons and certificates are sold for consumption or use within the meaning of section 905 of the revenue acts of 1918 and 1921 and are, therefore, liable to the tax imposed by that section of the law on the fair market value of the premiums at the time of the exchange.

"Therefore, as the tax involved in this claim was computed on the basis of the fair market value of the premiums at the time of the exchange, the claim is accordingly rejected in full."

X. No action other than the filing of said appeal by plaintiff to the Commissioner of Internal Revenue, and the disallowance on or about January 7, 1926, of the said appeal for a refund of said $16,944.22 of said taxes, has been had on this claim in Congress or any of the departments.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, a New Jersey corporation, manufactures and sells toilet and laundry products, such as soaps, wash-

ing powders, etc. In marketing its various products the corporation, in or about the year 1890, established the system of issuing coupons to consumers of its laundry products, exchangeable for certain articles of jewelry listed in its catalogue.

On each wrapper or container of its laundry soaps and powders a place was reserved for printing a coupon. Attention was drawn to the coupon in rather bold-faced type by the following words, appearing upon another portion of the wrapper or container, viz, "Save the coupon on the other side of the package." Extending along the narrow sides of the wrapper or container, in conspicuous type, appeared an engaging solicitation to save the coupons and directions as to how to procure premiums. When a sufficient number of coupons had been accumulated the holder thereof was entitled to the specific article of merchandise listed in the catalogue as obtainable upon presentation of the requisite number of coupons. A vast number of illustrated catalogues were circulated by the plaintiff among the trade, setting forth with precision the exact number of coupons necessary to obtain a specified article of merchandise. In addition to this the plaintiff maintained during the period involved in this litigation approximately 50 separate stores, each employing two clerks, at an annual expense of $3,000, where coupons could be presented in exchange for premiums, as stated in the catalogues. Twenty trucks owned and operated by the plaintiff supplemented the above method of redeeming coupons. Some of these trucks traversed the streets of certain cities, while others extended their tour into the country districts redeeming coupons as per catalogues.

This special feature of the plaintiff's business activities attained vast proportions. In a period of four years—i. e., from 1920 to 1924, inclusive—the plaintiff redeemed over 920,000,000 coupons, having concededly issued millions which had not been presented for redemption.

The plaintiff admits that approximately 25% of all the merchandise catalogued as premiums during the period covered by this controversy consisted of articles of jewelry.

It is manifestly a fact, not disputable, for the catalogues confirm the admission both by illustration and description.

Section 905 of the revenue act of 1918, 40 Stat. c. 18, p. 1057, is as follows:

"SEC. 905. That on and after April 1, 1919, there shall be levied, assessed, collected, and paid (in lieu of the tax imposed by subdivision (e) of section 600 of the revenue act of 1917) upon all articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted, or fitted with, precious metals or imitations thereof or ivory (not including surgical instruments); watches; clocks; opera glasses; lorgnettes; marine glasses; field glasses; and binoculars; *upon any of the above when sold by or for a dealer or his estate for consumption or use, a tax equivalent to 5 per centum of the price for which so sold.*"

On May 2, 1919, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, issued the following regulation:

"The giving of so-called 'premiums' in return for wrappers, labels, coupons, trading stamps, or other scrip, delivered or sold in connection with the sale of a commodity, is a sale within the meaning of section 902 and section 905 if the premium is within the class of articles enumerated in those sections. In such cases, the tax attaches at the time title in the premium passes to the person receiving it in exchange for such scrip, and is to be computed on the fair market value of the premium at such time."

On July 17, 1919, the above regulation was amended by the addition of the following words:

"No tax attaches to the gift of an article which if sold would be taxable. Premiums given in return for wrappers, labels, coupons, trading stamps, or other scrip are not considered as gifts."

The revenue act of 1921, section 905 (a) (42 Stat. c. 136, p. 227), contained the excise tax by the following provisions:

"SEC. 905. (a) That on and after January 1, 1922, there shall be levied, assessed, collected, and paid (in lieu of the tax imposed by section 905 of the revenue act of 1918) upon all articles commonly or commercially known as jewelry,

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whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted, or fitted with, precious metals or imitations thereof or ivory (not including surgical instruments, eyeglasses, and spectacles); watches; clocks; opera glasses; lorgnettes; marine glasses; field glasses; and binoculars; upon any of the above when sold by or for a dealer or his estate for consumption or use, a tax equivalent to 5 per centum of the price for which so sold."

Following the quoted statutes, and in pursuance of the adopted regulations continued in force during the existence of the revenue law, the commissioner levied, assessed, and collected between December 27, 1920, and July 23, 1924, from the plaintiff excise taxes to the amount of $16,944.22, classifying plaintiff as a dealer in jewelry. A claim for refund was seasonably filed, subsequently refused, and this suit is for the recovery of the above amount, predicated upon an alleged illegal exaction under the applicable statutes.

It is first insisted that section 905 of the revenue act as originally enacted and subsequently reenacted, with modifications, was clearly intended as an excise tax upon regular and established dealers in jewelry, and was not designed to reach an enterprise solely incidental to the substantial purpose and real business of the corporation involved. The original purpose of Congress in imposing this so-called luxury tax, as clearly deducible from the act of 1917, was to tax the jewelry industry at the source. The tax by this legislation was imposed upon the manufacturer, producer, or importer. The act of 1918 reverses this legislative policy and the tax is laid upon one whose principal business is the sale of such articles for consumption or use. As aptly observed by the plaintiff, the effect of this legislation was to transfer the tax directly to the consumer and limit the imposition to regular dealers. The act of 1921 emphasizes the legislative intent as to this particular insistence by inserting the words "when sold by or for a dealer or his estate for consumption or use." The progress of the various acts through Congress confirms the contention of the plaintiff, to the extent at least of sustaining the assertion that "*dealers*" in jewelry were

to be reached. Notwithstanding the apparent positiveness of the designed purpose and extent of the tax, the question leaves open for decision the real critical issue in the case, i. e., is the plaintiff a regular dealer or a dealer in jewelry within the terms of the act. The act itself is not ambiguous. The court need not resort to rules of construction to ascertain its meaning or scope. The issue involved is obviously one as to whether under the facts developed the plaintiff comes within its terms and is thus subject to the tax.

There is nothing mysterious or particularly obscure in the term "dealer" or "regular dealer." Congress did not employ the term in any restricted, narrow, technical sense. Revenue was to be exacted from a business enterprise where jewelry was sold. Congress did not intend to burden an incidental sale or inconsequential incomes from sales, even though the article of merchandise was regarded as a luxury. Surely a business enterprise may not escape the tax because perchance it holds itself out to the world as primarily engaged in the manufacture and sale of soap, when at the same time it purchases and transfers to its ultimate consumers a class of merchandise costing vast sums to accumulate and equally large sums to distribute. If this is so, it would be difficult, indeed, to reach any mercantile establishment dealing in numerous commodities but specializing in a single one. There is no insurmountable obstacle in the way of classifying a business upon the basis of two attainable objectives, both of which are sufficient in extent to come within the meaning of the word "dealer." We can not doubt that ancillary enterprises, inseparably linked with the principal object of inducing returns upon what the owners and operators of a large corporation designate their principal business, may become so closely merged that it is difficult to segregate one from the other. This case, it seems to us, demonstrates the fact. Within a period of four years over nine hundred million coupons are issued, each of which has an intrinsic monetary value, obligating the corporation to purchase and maintain available articles of jewelry at the cost at least of $338,884.40; entering into innumerable contracts to exchange

one for the other, and maintaining at great expense a segregated organization to care for and administer the enterprise. If this does not constitute the plaintiff a dealer in jewelry, and one, if not the principal, activity in the sale of its merchandise, it is indeed difficult to define the term. Catalogues by the thousands were freely circulated throughout the desired territory of the trade, in each of which there were conspicuously displayed by attractive illustrations and descriptions innumerable articles of jewelry, ranging in value from insignificant sums to real and valuable gold and silverware, that a consumer was entitled to claim upon presentation of the requisite number of coupons. It is common knowledge, universal experience, that jewelry is the most enticing form of premium. The supposed acquisition of an article of luxury by a consumer upon the erroneous impression that he acquires something for nothing is the fundamental reason for the wide expansion of the system.

An argument is advanced that the receipt of a legal consideration for the premium jewelry articles did not of itself render them taxable, that the giving of coupons to be exchanged for jewelry is not a sale within the meaning of the revenue act. The statement of the first proposition removes the possibility of characterizing the transaction as a gift. If the second one is to be conceded, there is but one other source of refuge, unless it may be possible to isolate the transaction and attach to it a hybrid classification partaking of the characteristics of neither a sale, exchange, nor gift. A review of the State cases indicates a contrariety of opinion upon this very subject. In every instance when the above controversy has come before the State courts, the contention of the proponents of the system has consistently been that the transaction is not a gift nor a sale, but an item of overhead expenses allottable to the advertising budget. The cases are far too numerous to cite, and have uniformly arisen through some form of State legislation directed toward the restriction or prohibition of the system. The plaintiff in its brief cites the following typical cases: *Hewin* v. *Atlanta*, 121 Ga. 723; *O'Keefe* v. *Sommerville*, 190 Mass. 110; *Ex Parte McKenna*, 126 Cal. 429; *State* v. *Dalton*, 22 R. I. 77.

On the other hand, it is not difficult to find an array of eminent State authorities sustaining the contention of the defendant that the transaction is a sale. In *Commonwealth* v. *Emerson*, 165 Mass. 146, the supreme court of the Commonwealth relieved a dealer accused under a prohibitive statute forbidding the giving of prizes or gifts as an inducement for the sale of an article of merchandise by holding a transaction substantially similar to the one in suit to be a sale and not a gift. The opinion of the court uses this significant language:

"We must give these words a reasonable meaning. They were not intended and do not purport to forbid a sale of two things at once, even if one of them is the principal object of desire and the other an additional inducement which turns the scale."

See also *Commonwealth* v. *Sisson*, 178 Mass. 578; *Merchants Legal Stamp Co.* v. *Murphy*, 220 Mass. 281.

The court in deciding the case of *Sperry & Hutchinson* v. *Hertzberg*, 69 N. J. E. 264, characterized a premium transaction which in our opinion applies with especial force to the one in suit. The court said:

"I think it is very important to the comprehension of this case to perceive at the start that, while the trading stamp is of no value whatever, and evidences no right of redemption until it 'has been issued in the regular way,' by a subscriber of the complainant to his cash customers, and therefore necessarily has been 'collected in the regular way' by such customer, after such issuance and collection it represents a property right of quite definite pecuniary value, which the complainant has most distinctly and intentionally made generally transferable. This property right is bought and paid for by the collector. The stamp is practically a negotiable order for merchandise. It is a mistake to regard it as a gratuity. Shoppers are invited to buy merchandise for cash from the complainant's subscribers because for their money they get certain articles which the subscribers purvey, and also the right to select and receive certain other articles which the complainant purveys. Under this trading scheme \$100 buys goods of that price or value from the merchant and goods of the value of \$3, \$4, or \$5 from the complainant."

See also *Benbow-Brammer Co.* v. *Heffron-Tanner Co.*, 144 Fed. 429–431.

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Without burdening this opinion with additional citations of decided cases, many available to the same effect, we deem it sufficient to close this point of the discussion by referring to what was said by the Supreme Court in the case of *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342. Here the Supreme Court had before it the constitutionality of State legislation subjecting premium-giving merchants to a special tax. In the course of the opinion, and decisive of a contention that profit-sharing coupons and trading stamps were in legal effect no more than a process of advertising, the court said:

"It would be an endless task to cite cases in demonstration [of lawful restrictions upon liberty of contract and business], and that the supplementing of the sale of one article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. * * * The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price."

The plaintiff contends that the method employed by it in the redemption of coupons and distribution of premiums completely removes the transaction from the operation of the taxing law and from the conclusive effect of the precedents last cited. To sustain this contention emphasis is laid upon a claimed distinction between a direct transaction between the dealer and the coupon recipient and one, as in this case, where the merchandise is sold directly to the consumer by the retailer and the coupons redeemed by the plaintiff, the wholesaler. By this method a claim is made that the premium articles were not sold by the plaintiff, and the taxing act clearly contemplates reaching only "actual sales." The argument is not impressive. The statute lays the tax upon the articles "when sold by or for a dealer or his estate." It is apparently unimportant, so far as the statute is concerned, whether the dealer himself sells the

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articles directly or engages through another to complete transactions the dealer expressly authorizes him to complete. The plaintiff earnestly urges that—

> "The sole legal consideration passing to claimant from the persons purchasing its wares from the corner groceryman, or other retail dealers therein—*was not the payment to it of any money whatsoever.* On the contrary, it was the payment of money *to a distinct stranger or third party.* * * * Certainly neither claimant nor the ultimate consumers of its wares had the slightest intention, on the one hand, of *selling*, or, on the other, of *buying*, in the ordinary sense of these terms, premium jewelry articles merely *exchanged* for claimant's coupons without any payment of money to it whatsoever."

The argument quoted applies to a gift, and the plaintiff frankly admits that the premiums are not gifts. The record discloses and the findings exhibit that the cost of premiums involved and the overhead expense of administering the system are included in the selling price of the laundry products, and the retailer who distributes the product pays the same. So that in its final analysis the consumer receives from the wholesaler a small or large discount, according to the extent of his purchases, upon the purchase price of the wholesaler's products paid to the retailer, and the retailer derives the valuable consideration which this offer of discounts attracts in the way of added customers and a larger volume of sales. In plain words, the plaintiff says to the consuming public: If you will buy my laundry products from the corner groceryman, I will pass title to you to more than a cake of soap or a package of powdered soap. I will enhance the value of your purchase by adding thereto in proportion to the quantity you purchase such articles of merchandise as the amount of your purchase warrants, and agree that when my agent, the corner groceryman, makes the sale, he will deliver to you a due bill upon me, which I promise to honor in payment. The groceryman by this transaction pays to the wholesaler more for the soap than he would pay without it, and passes the added cost on to the consumer. Is there any possible doubt as to who in the end receives consideration for the premiums transferred?

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As a matter of fact, the wholesaler receives the consideration for the premiums to be distributed in advance of their distribution, and if losses occur the retailer suffers, unless duly compensated by the increased volume of business induced by the establishment of the premium system.

Many other arguments are persistently and ably set forth in plaintiff's briefs, pointing out the inapplicability of the taxing law. They have not escaped attention nor careful consideration, notwithstanding the lack of comment with reference thereto. We can not escape the conclusion that where one engages in a business, vast in extent, involving a separate and distinct organization, incurring great annual expense and advertising the enterprise extensively and continuously, such a one is a dealer in the commodities disposed of. In our view of the case, there must of necessity exist thousands of small dealers in jewelry in the country, not even approaching the magnitude of the plaintiff's jewelry transactions, and with whom the plaintiff came into actual and effective competition, who have had to pay the tax mentioned in the revenue act.

We are unable to abstract from the arguments put forth to escape the tax wherein the plaintiff essentially differentiates its jewelry business from the ordinary and customary method of sales over the counter for cash or on credit by simply departing therefrom to the extent of recognizing an obligation to transfer title to an article of jewelry kept on hand, upon the presentation of coupons previously issued to the purchaser for a valuable consideration; and this conclusion is not affected by the fact that upon sporadic occasions for the establishment and promotion of plaintiff's business it sometimes disposed of its products for less than its usual wholesale price and perhaps at a loss. Obviously such a campaign was temporary in character and duly compensated for within a reasonable time or permanently discontinued. At any rate, there is nothing in the record to indicate that it in any way retarded the development of the coupon system or converted the exchange of coupons for jewelry into an adopted system of giving the premium jewelry away. On the contrary, the evidence establishes that the coupons issued possessed a sufficient monetary value;

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that despite the expressed terms upon which they were issued, forbidding their transfer, they fell in large numbers into the hands of brokers, buying up the same, a practice which cost the plaintiff both time and money to in part forestall.

A final impediment to the collection of the tax is said by the plaintiff to reside in the fact that the *price* for which the articles of jewelry are exchanged for coupons is not ascertainable, and hence the regulations for the collection of the tax are contrary to the wording and intent of the law. To so contend is the equivalent of asserting that if a dealer in jewelry establishes a method of selling his merchandise, which method obscures the ready ascertainment of the selling price of the article sold, he may escape the revenue laws and carry on free from this burden. In other words, he may indirectly accomplish a result which he may not directly do. The statute uses the words "a tax equivalent to 5 per centum of the price for which so sold." Manifestly, the commissioner in the administration of the revenue laws is not bound to accept the return of the dealer as to price. Investigations and audit may be made of the dealer's transactions to ascertain the verity of the returns, or reasonable regulations, lawful, of course, and conducive to the correct administration of the law, may be promulgated. Tested by the commissioner's authority and the extent of his power under the statute, we are unable to find the difficulties which the plaintiff so vigorously protests as present. The plaintiff, in fixing the value of jewelry premiums, predicates their acquisition upon a sufficient number of redeemed coupons to cover not only the market value of the article transferred, but adds thereto the proportionate cost of overhead incurred in the conduct of the business, and thereby really obtains an estimated price somewhat in excess of the market value of the jewelry. The price thus fixed by the plaintiff embraces within its computation elements of uncertainty and estimates, and may or may not reflect stable and precise return for the articles sold. The commissioner, on the other hand, resorts to a basis easily ascertainable and obviously to the advantage of the taxpayer in that estimates and *pro rata* apportionments of overhead, etc., are absent.

We have not overlooked the principles of statutory construction applied to taxing acts by the Supreme Court in the *Gould case*, 245 U. S. 151; or the *Merriam case*, 263 U. S. 179. The distinction we observe between this case and those adjudicated in the above-cited cases lies in the fact that the record in this case clearly proves the existence of a sale "*price*" within the statute, and the court is not at liberty to overlook decisive precedents which impose upon a litigant seeking exemption from the payment of a tax the burden of clearly proving his right to the same. *Cornell* v. *Coyne*, 192 U. S. 418, 431. The commissioner promulgated the regulations challenged as a reasonable method of ascertaining the tax, wherein the statute measures it by the price received, under the revenue acts of 1918, 1921, and 1924. The luxury tax on jewelry sales continued as expressed in the foregoing statutes until omitted from the revenue act of 1926. Treasury decisions have repeatedly construed the regulations, and Congress, fully aware of this settled construction of the law by the commissioner, reenacted without material change the section involved, thereby giving to the regulations the weight of its approval. *Provost* v. *United* 269 U. S. 443.

The petition will be dismissed. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

JACOB DOLD PACKING CO. v. THE UNITED STATES

[No. C–1163. Decided December 3, 1928]

On the Proofs

Purchase of packing-house products; contract with Quartermaster Corps, U. S. Army; formality of execution; failure to fix price; allotment by Food Administrator; breach by Government; measure of damages.—See *Swift* v. *United States*, 59 C. Cls. 364; *Libby, McNeill & Libby* v. *United States*, 65 C. Cls. 341.

Reporter's Statement of the Case

Evidence; books of account; proof.—Where the books of account, upon which a case is based, involve an enormous number of entries, it is sufficient if they are verified on the stand by a supervising officer who knew them to be the books of regular entries kept in the establishment and which were relied upon in the regular course of the business. And expert testimony as to the result of a calculation made therefrom is not to be excluded merely because the witness was an accountant of of the party not bearing the burden of proof.

The Reporter's statement of the case:

Mr. Spencer Gordon for the plaintiff. *Mr. Leo P. Harlow* and *Covington, Burling & Rublee* were on the briefs.

Messrs. J. Robert Anderson and *Charles F. Jones*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, Jacob Dold Packing Company, is and at and before the times herein involved was a corporation duly organized and existing under the laws of the State of New York; and was during the period in question a packing company with its principal plants at Buffalo, New York, and Wichita, Kansas.

II. On April 6, 1917, the Congress of the United States declared war against Germany, and on April 12, 1917, the following general orders were promulgated by the Secretary of War:

General Orders, No. 49.

WAR DEPARTMENT,
Washington, April 28, 1917.

I. The following War Department orders are published to the Army for the information and guidance of all concerned:

WAR DEPARTMENT,
Washington, D. C., April 12, 1917.

Orders:

1. It is hereby declared that an emergency exists within the meaning of section 3709, R. S., and other statutes which except cases of emergency from the requirement that contracts for and on behalf of the Government shall only be

made after advertising as to all contracts under the War Department for the supply of the War Department and the supply and equipment of the Army and for fortifications and other works of defense; and until further orders such contracts will be made without resort to advertising for bids in the letting of the same.

2. Where time will permit, information will be given to the Munitions Board constituted by the National Council of Defense, through the supply bureaus' representative, of orders to be made for supplies, with a view of assistance from the board in placing the orders and in order that the supplies of the War Department may be coordinated with those of the Navy and other executive departments and secured at prices not in excess of those paid by other departments.

3. It is to be understood, however, that the responsibility of the several supply bureaus for promptly supplying the needs of the Army must be recognized, and where time will not admit of the delay involved in consulting the Munitions Board the supply bureaus will retain their present initiative in contracting without reference to the board.

NEWTON D. BAKER,
Secretary of War.

By order of the Secretary of War:

H. L. SCOTT,
Major General, Chief of Staff.

Official:
H. P. MCCAIN,
The Adjutant General.

III. By Special Orders, No. 94, War Department, dated April 24, 1917, it was directed that Col. Albert D. Kniskern, relieved from duty as quartermaster, Central Department, "assume charge of the general depot of the Quartermaster Corps at Chicago, Ill.," and by Special Orders, No. 193, War Department, dated August 20, 1917, it was directed that Capt. Otto F. Skiles, Quartermaster Officers' Reserve Corps, be assigned to active duty and proceed to Chicago, Ill., "and report in person to the depot quartermaster for assignment to duty as his assistant."

Colonel (afterwards Brigadier General) Kniskern remained on duty as depot quartermaster at Chicago until his retirement on September 1, 1919.

Reporter's Statement of the Case

Major General George W. Goethals was Acting Quartermaster General from December 26, 1917, until his detail, on April 16, 1918, as Assistant Chief of Staff, and director of the division of purchase, storage, and traffic of the General Staff, which was a consolidation of the purchase and supply divisions and the storage and traffic divisions, which had been created by General Orders No. 14, of February 9, 1918, issued by the Acting Chief of Staff. General Orders, No. 16, of February 11, 1918, relating to control of quartermasters' supplies recited that "In order to provide suitable and adequate supplies for the Army, both for domestic and overseas consumption, divisions have been established in the office of the Quartermaster General which determine requirements," etc., and that "Based on data received by the Quartermaster General from the Chief of Staff, requirements are computed by the Quartermaster General through the Quartermaster Supply Control Bureau and forwarded to the several procurement divisions for purchase or manufacture," and that "the general supply depots of the Quartermaster Corps will be operated in accordance with instructions received from the Quartermaster General through the several procurement divisions" by General Orders No. 36, of April 16, 1918, the consolidation referred to was provided for. The powers of the consolidated division of purchase, storage, and traffic, so far as quartermaster supplies were concerned, were at this time advisory only, and its chief function was coordination.

General Goethals was succeeded in April, 1918, as Acting Quartermaster General by Brig. Gen. R. E. Wood, who continued as Acting Quartermaster General during the period here involved.

Different divisions, five in number, among them a subsistence division, had been created in the office of the Quartermaster General and, effective November 7, 1918, in connection with and as a part of a reorganization of the entire purchase, storage, and traffic system, they were transferred to the office of the Director of Purchase and Storage. Effective September 12, 1918, Brigadier General Wood, then Acting Quartermaster General, was appointed Director of Purchase

and Storage. By the order so designating him it was provided that he should "have responsibility for and authority over the purchase of such articles as are assigned to his organization from time to time and the storage, distribution, and issue within the United States of all supplies for the Army." The "paramount consideration" in connection with this reorganization was by official orders declared to be "uninterrupted supply," and in connection with the office of Director of Purchase and Storage the plan was "to reorganize and adapt the office of the Quartermaster General to the present plan, to use it as the control office for purchase and storage, and to bring commodity sections from other bureaus over to the commodity sections of the Quartermaster Department, where most of them already were," and in adopting this plan the office of the Quartermaster General was "reorganized to meet the needs of the Director of Purchase and Storage" and commodity purchasing sections to meet the needs of the entire War Department were created in the office of the director of purchase.

IV. On July 3, 1918, by office order No. 491, Quartermaster General's office, there was established in Chicago a packing-house products branch of the subsistence division of the Quartermaster General's office to be located in the general supply depot of the Quartermaster Corps at Chicago, to be under the immediate direction and control of the depot quartermaster, and to be responsible for all matters pertaining to the procurement, production, and inspection of packing-house products, subject to the control of the Quartermaster General.

The interpretation of this order by the then Acting Quartermaster General was "that whereas the purchasing of supplies was concentrated in Washington, that Chicago being the food market, we delegated to General Kniskern the purchase of meat products and articles of that kind."

V. On October 28, 1918, by purchase and storage notice No. 21, issued by Brig. Gen. R. E. Wood, as Director of Purchase and Storage, supply zones were created, and by said order the Director of Purchase and Storage appointed "as his representative in each general procurement zone the

present depot quartermaster to act and to be known as the zone supply officer," who was "charged with authority over and responsibility for supply activities within the zone under his jurisdiction."

This form of organization in effect transferred the field organization of the Quartermaster Corps to the office of the Director of Purchase and Storage. The procurement divisions which had theretofore existed in the Quartermaster Corps were transferred to the supply zones created in the purchase and storage organization, these zones being practically the same as those formerly existing in the Quartermaster Corps, over each of which the proper depot quartermaster exercised jurisdiction, and the depot quartermasters of the Quartermaster Corps became zone supply officers and representatives, as such, of the Director of Purchase and Storage.

Existing orders and regulations of the several supply corps with respect to supply activities transferred to the Director of Purchase and Storage were continued in effect, "providing that the zone supply officers constituted by the notice shall have final authority in their respective zones over all matters referred to in existing orders and regulations."

VI. There were numerous other orders, circulars, bulletins, and notices, aside from those herein specifically referred to, which were issued from time to time, many of them by General Goethals as Director of Purchase, Storage, and Traffic, a division of the office of the Chief of Staff which came finally to act in an executive rather than an advisory capacity, and many divisions, bureaus, and boards were created with assigned duties and authority, and reorganizations were had for the purpose of remedying defects in former organizations.

The general purpose was to centralize control of purchase and distribution of Army supplies in one authoritative head in Washington, which, acting directly or more generally through its subordinate bureaus, boards, or committees, should pass upon needs, authorize and supervise purchases, approve contracts, etc. There were a number of different departments created in the Division of Purchase, Storage,

and Traffic, General Staff, and after the creation of the Division of Purchase and Storage and the appointment of General Wood, Acting Quartermaster General, as Director of Purchase and Storage, that office was organized with many divisions, some of a general administrative character and many others with jurisdiction in the matter of purchases of specific character of supplies.

Supply circulars and such like documents as were sent out in large numbers were for the most part in general terms so far as the character of the supplies to which applicable was concerned and they required some preliminary action by and authority from the appropriate branch or board in Washington to authorize purchases.

From these numerous circulars providing authoritative procedure in the purchase of supplies generally, covering a wide field, there was no specific exception as to meat supplies for the troops, but they were never treated as applicable thereto. The necessities during the period of the war precluded such application.

The furnishing of adequate meat supplies for the Army was within the authority and duty of the Acting Quartermaster General and afterwards within his authority and duty as Director of Purchase and Storage. General Kniskern, as depot quartermaster at Chicago, was the authorized representative of the Acting Quartermaster General in the purchase of meat supplies and, while subject to any specific instructions which the Acting Quartermaster General might see fit to give him, his duty was to supply the needs, and specific authority as to each purchase was not required. There was in the office of the Quartermaster General a subsistence division, but the chief duty it exercised in the matter of the purchase of meats was to supply General Kniskern with such information as might be available as to future needs, leaving it to him to supply them. The authority of General Kniskern in connection with the establishing in Chicago of a packing-house products branch of the subsistence division of the Quartermaster General's Office and in connection with his later appointment as zone supply officer appears in Findings IV and V.

Reporter's Statement of the Case

VII. On September 17, 1918, Capt. Jay C. Shugert, Quartermaster Corps, was, by authority of the Acting Quartermaster General, designated as purchasing and contracting officer for the packing-house products and produce division of the office of the Depot Quartermaster at Chicago.

At this time the "packing-house products branch of the subsistence division of the Quartermaster General's Office," created on July 3, 1918, had jurisdiction over the purchase of packing-house products here involved, subject to the control of the Quartermaster General, which division afterwards by transfer became a division of the office of the Director of Purchase and Storage.

On January 8, 1919, by Depot Order No. 323, the contract and inspection branches of the packing-house products division (of the depot quartermaster's office) was "transferred to the packing-house products branch, subsistence division, office of the Director of Purchase and Storage" to be "absorbed in the proper sections of that branch" and the packing-house products division was "eliminated as a division of this depot."

By Change Order No. 31, dated January 9, 1919, Capt. Jay C. Shugert, Quartermaster Corps, and other named officers of that corps, were "relieved from further duty in the packing-house products division and are assigned as assistants to the officer in charge packing-house products branch, subsistence division, officer Director of Purchase and Storage."

In an order of February 15, 1919, announcing assignments of officers there appeared, among others, the following paragraphs:

"Packing-house products branch, subsistence division, office of Director of Purchase and Storage. O. F. Skiles, major, Quartermaster Corps, in general charge. J. C. Shugert, captain, Quartermaster Corps, in direct charge."

* * * * * * *

"Office service section, J. C. Shugert, captain, Quartermaster Corps, in charge."

VIII. In supplying the needs of the Army for bacon and other packing-house products during the early stages of the

war the regular method of advertising for and receiving bids and letting contracts to lowest bidders, if otherwise satisfactory, was adhered to, but later on, in 1917 and during 1918, the needs had so grown and were so rapidly approaching the capacity of the packing plants that this method became impracticable, and the necessity for a constant and ever-increasing flow of supplies of this character made necessary the resort to other purchase and procurement methods.

The office of the depot quartermaster, afterwards the zone supply officer, at Chicago was informed from time to time by the proper authorities at Washington as to the number of men which would be in the service within stated times, and the duty devolved on the depot quartermaster of procuring supplies of the kind in question sufficient for the indicated number of men without the issuance of specific authorization to him in each instance to purchase or specific instructions as to quantities to be purchased. And because of the time required to cure, smoke, and can Army bacon it was necessary to anticipate needs therefor.

The plan was adopted by the depot quartermaster at Chicago of calling into conference with him or his authorized assistant, from time to time, representatives of this plaintiff and the six other large packing houses, at which conferences the packers' representatives were informed as to the needs of the Government for a stated period, usually three months, sufficiently in the future to give time for manufacture, and asked to indicate what portion of the stated needs each would furnish. Upon receipt of the statements from the packers as to what quantities they would furnish, which were submitted in writing and usually within a few days after the conference, the depot quartermaster made an allotment to each packer and notified each as to the quantities it would be expected to furnish during each month of the period involved.

Only representatives of the large packers were called into these conferences, because upon them chief dependence for adequate supplies must be placed, but the smaller packers were also called upon and as needs increased were urgd to furnish as much as they could of their products.

IX. Since there were many elements entering into cost of production as to which there were frequent fluctuations, it was not practicable to undertake to determine prices so far in advance, and, accordingly, instead of fixing prices at the time the proposals were submitted, or notices of allotments issued, it was agreed that prices would be determined at or near the first of each month for the product to be furnished during that month. This was at a time when of necessity the preparation of the product, in this instance bacon, was well under way, approaching completion as to a large part thereof and when the cost of the green bellies, the basic element of final cost, and other fluctuating elements of cost were ascertainable.

At about this time the usual form of circular proposals were sent to the packers, not for use in submitting bids as under the peace-time competitive system, but as a convenient method for formal submission by the packers of their proposals as to price for the product which they had theretofore been directed to furnish during the month in question and which already, by direction of the depot quartermaster, was in process of preparation.

Upon submission of these proposals as to price, if the same were satisfactory to the depot quartermaster or, otherwise, upon adjustment to a satisfactory basis, purchase orders were issued, which furnished the basis of payment, although the purchase orders frequently were not issued until a part and sometimes all of the product covered thereby had been delivered.

X. On November 17, 1917, the United States Food Administration found and announced that "the demand for certain food commodities by the Army and Navy, neutral, allies, and civil population is greater than the supply of such commodities," that the shortage and the aggregation of buying in large quantities "has effectually suspended the law of supply and demand as an effectual regulator of prices," that the normal purchase of these commodities in large quantities by bid and contract is not only impossible in some cases but raises the prices and stimulates speculation

and that therefore it is vital that large purchases of certain commodities be made by allocation at fair prices, the Federal Trade Commission to determine costs of production, and proposed to the Army and Navy, in order to organize such a program, the appointment of a conference committee composed of the chief of the food administration division of coordination of purchases, the Quartermaster General of the Army, the Paymaster General of the Navy, and a representative of the Federal Trade Commission, the committee to determine from time to time "which commodities are to be placed in the above category of 'allocated purchases,' the method of negotiation, and principles of purchases." In the suggested plan it was provided that the Federal Trade Commission should determine costs, the committee should recommend a price, and that "the Army and Navy shall each be furnished with a memorandum showing the amount allocated to the manufacturer and the price, and they shall complete the purchase and attend to all matters of inspection, shipment, and payment."

Pursuant to this suggestion the food purchase board was organized, with the approval of the Secretary of War and the Secretary of the Navy, on December 11, 1917, constituted of the officials suggested, or their authorized representatives, and on May 8, 1918, the President formally authorized the organization of the food purchase board to consist of a representative of the Secretary of War, the Secretary of the Navy, the Federal Trade Commission, and the United States Food Administration.

XI. Under date of February 19, 1918, the following letter, which was afterward communicated to the packers, plaintiff included, was written by the President to the Food Administrator, viz:

THE WHITE HOUSE,
Washington, 19 February, 1918.

MY DEAR MR. HOOVER: May I not call your attention to this important point:

There is pressing need of the full cooperation of the packing trade, of every officer and employee, in the work of hurrying provisions abroad. Let the packers understand

that they are engaged in a war service in which they must take orders and act together under the direction of the Food Administration if the Food Administration requires.

Cordially and sincerely yours,

[SEAL.] WOODROW WILSON.

Hon. HERBERT HOOVER,
Food Administration.

This letter was prepared by Joseph P. Cotton, a lawyer, of New York, who, during the latter part of 1917 and the first half of 1918, was connected with the Food Administration without salary, engaged particularly in looking after purchases and shipments of meats to allied countries. He was seeking cooperation between the packers, as to which they seemed hesitant for fear of possible alleged breaches of the Sherman Act, and he conceived the idea that the difficulty might be removed if they felt that what he wanted them to do " was a governmental order by war authority."

XII. At a meeting of the Food Purchase Board held on July 16, 1918, it was concluded that on account of the shortage which had developed in canned meats and bacon these products should be placed on an allotment basis. On August 12, 1918, the depot quartermaster at Chicago was notified from the office of the Quartermaster General by the officer in charge of the subsistence division that it was understood that tinned meats, including tinned bacon and smoked bacon, would be allocated by the Food Administration.

On November 9, 1918, a conference was held on the call of General Kniskern, at which he and Major Skiles, for the Government, were present and representatives of the seven large packers, including Jacob Dold Packing Company, for the purpose of providing allotments of bacon and other meat products for the months of January, February, and March, 1919. The quantity of bacon asked for, for the three months stated, was 60,000,000 pounds, 30,000,000 pounds each of Serials 8 and 10.

XIII. November 12, 1918, Jacob Dold Packing Company sent to the office of the depot quartermaster at Chicago the following communication:

CHICAGO, ILLINOIS, *Nov. 12th, 1918.*

MAJOR SKILES,
% *Depot Quartermaster,*
1819 W. 39th St., Chicago.

DEAR SIR: We beg to tender you herewith the following products as per your request:

75,000 # Fresh frozen New York shoulders weekly Nov. and Dec. f. o. b. our plant Wichita.
175,000 # Same weekly November and December f. o. b. Buffalo.
2,250,000 # Bacon, Serial 8 (about 25% bellies); shipment. 750,000 # monthly, January, February, March from Wichita.
3,750,000 # Bacon, Serial 10 (about 25% bellies); shipment, 1,250,000 # monthly, January, February, March from Buffalo.
1,500,000 # Smoked hams (25% picnics; shipment 500,000 # each January, February, March; part Buffalo, part Wichita.
156,029 # Cans No. 2 corn beef each month, January, February, March, from Buffalo, subject to our getting required amount beef to make same.

Yours very truly,
JACOB DOLD PACKING CO.,
By JAMES G. COWNIE.

P. S. This cancels previous tender left with you Thursday
J. G. C.

XIV. November 30, 1918, the Food Administration sent the following communication to the Jacob Dold Packing Company, which was accepted by said company and returned to the Food Administration:

18 UNITED STATES FOOD ADMINISTRATION,
MEAT DIVISION,
111 West Washington Street, Chicago, Illinois, Nov. 30/18.
2186

From: U. S. Food Administration, Meat Division.
To: J. Dold Pkg. Co., East Buffalo, New York.
Subject:

1. On requisition of the Packing House Products Branch, Subsistence Division, Office of Quartermaster General, 1819

Reporter's Statement of the Case

W. 39th St., Chicago, Ill., you have been allotted for delivery during the month of—

Product	Quantity	Price
	Pounds	
Jan., 1919. Bacon, Serial No. 10	1,250,000	To be determined later.
Feb., 1919. Bacon, Serial No. 10	1,250,000	
Mar., 1919. Bacon, Serial No. 10	1,250,000	
Jan., 1919. Corned beef	234,043	
Feb., 1919. Corned beef	234,043	
Mar., 1919. Corned beef	234,043	

2. The above to be in accordance with Q. M. C. Form 120 and amendments thereto.

3. For any further information regarding this allotment, apply to the Packing House Products Branch, Subsistence Division, Office of the Quartermaster General, 1819 W. 39th St., Chicago, Ill.

To be signed and returned to Meat Division, 111 W. Washington St., Chicago.

UNITED STATES FOOD ADMINISTRATION,
MEAT DIVISION,
By E. L. ROY.

F Accepted:
JACOB DOLD PKG. CO.
Per JAS. G. COWNIE.

XV. December 3, 1918, the Food Administration sent the following communication to Jacob Dold Packing Company, which was accepted by said company and returned to the Food Administration:

19 UNITED STATES FOOD ADMINISTRATION,
MEAT DIVISION,
111 West Washington Street, Chicago, Illinois, Dec. 3/18.
Additional allotment. 2206
From: U. S. Food Administration, Meat Division.
To: J. Dold Pkg. Co., East Buffalo, New York.
Subject:

1. On requisition of the Packing House Products Branch, Subsistence Division, Office of Quartermaster General, 1819 W. 39th St., Chicago, Ill., you have been allotted for delivery during the month of—

Product	Quantity	Price
	Pounds	
Jan., 1919. Bacon, Serial No. 10	750,000	To be determined later.
Feb., 1919. Bacon, Serial No. 10	750,000	
Mar., 1919. Bacon, Serial No. 10	750,000	

2. The above to be in accordance with Q. M. C. Form 120 and amendments thereto.

3. For any further information regarding this allotment, apply to the Packing House Products Branch, Subsistence Division, Office of the Quartermaster General, 1819 W. 39th St., Chicago, Ill.

To be signed and returned to Meat Division, 111 W. Washington St., Chicago.

UNITED STATES FOOD ADMINISTRATION,
MEAT DIVISION,
By E. L. ROY.

F Accepted:
JACOB DOLD PKG. CO.
Per JAS. G. COWNIE.

XVI. The following letter was sent to Jacob Dold Packing Company from General Kniskern, December 10, 1918:

WAR DEPARTMENT,
1819 West 39th Street, Chicago, Ill., Dec. 10, 1918.

Div. 1–1–b.
No. 431.5 P&S–PC.
From: Officer in Charge Packing House Products Br., Subsistence Div., Office Director of Purchase and Storage.
To: Jacob Dold Packing Company, Buffalo, N. Y.
Subject: Bacon, Serial 10, January, February, and March.

1. In connection with the offer you made to this office on bacon, Serial 10, for delivery during the months of January, February, and March, you will please find indicated below the schedule of deliveries this office requests you to make:

January, 2,000,000 lbs.
February, 2,000,000 lbs.
March, 2,000,000 lbs.

2. In order that proper arrangements can be made and all concerned informed accordingly, you are further requested to advise this office by return mail where you contemplate putting up these allotments.

By authority of the Director of Purchase and Storage:

A. D. KNISKERN,
Brigadier General, Q. M. Corps,
Officer in Charge.
By O. W. MENGE,
2nd Lieut., Q. M. Corps.

OWM.MJP

Reporter's Statement of the Case

XVII. The following letter was sent by Jacob Dold Packing Company to the office of the Quartermaster General in Chicago, December 12, 1918:

DECEMBER 12, 1918.

WAR DEPARTMENT,
Office of Quartermaster General,
1819 West 39th St., Chicago, Ill.

GENTLEMEN: Replying to your favor of the 10th inst., in regard to allotments of bacon, Serial 10, for delivery during the months of January, February, and March, we wish to advise you that we will smoke about 750,000 pounds each month, during the months mentioned at our Wichita plant, who will ship the bacon to Buffalo, where we will put same in cans. Balance of the goods will be put up in Buffalo.

We trust this is the information you asked for in the above-mentioned favor.

Very truly yours,
JACOB DOLD PACKING COMPANY.
Per

JJS:FJB

XVIII. January 24, 1919, the following communication was sent Jacob Dold Packing Company:

WAR DEPARTMENT,
GENERAL SUPPLY DEPOT, U. S. ARMY,
ZONE SEVEN.

Packing House Products Branch, Subsistence Division, 431.5–PH. Office Director of Purchase and Storage, Jan. 24, 1919, 1819 W. 39th St., P. O. L. Box 00, Chicago, Illinois.

From: Zone Supply Officer, Zone Seven, Packing House Products Branch, Subsistence Division, Office Director Purchase and Storage.

To: J. Dold Packing Company, 85 Exchange Bldg., U. S. Yds., Chicago, Ill.

Subject: Packing House Products.

1. Due to the large quantities of bacon, corned beef, roast beef, and corned-beef hash now on hand, and in view of the fact that the Army is rapidly being demobilized and the demand constantly decreasing, you are informed that this office will not be in the market for any of the above-mentioned products for delivery during the month of March, 1919, except as hereinafter stated.

2. Such quantity of bacon as is now in process of cure, over and above the quantity necessary to take care of Feb-

ruary awards, and which has been passed by inspectors of this office, will be accepted.

3. This information is furnished you for the purpose of giving as much advance notice as possible of the intentions of this office in order that you may take such steps as you may deem necessary toward the reconstruction of your commercial trade.

4. There is at present no likelihood of any further purchases of the products mentioned for several months.

5. Please accept the sincere thanks of this office for the hearty and loyal cooperation your firm has so generously given in the past, without which the difficulties of securing sufficient meat foods for the Army would have been wellnigh unsurmountable.

By authority of the Director of Purchase and Storage:

A. D. KNISKERN,
Brigadier General, Quartermaster Corps,
Zone Supply Officer.
O. F. SKILES,
Major, Quartermaster Corps.

OFS–JW

A true copy.
A. J. SIPP,
2nd Lt., Quartermaster Corps.

XIX. March 6, 1919, the following communication was sent to Jacob Dold Packing Company:

WAR DEPARTMENT,
Chicago, Ill., March 6, 1919.

No. 431.5–PH.
Div. 1.

From: Zone Supply Officer, Zone 7, Packing House Products Branch, Subsistence Division, Office Director Purchase and Storage.

To: Jacob Dold Packing Co., 745 Williams Street, Buffalo, New York.

Subject: Extension of delivery date on packing-house products.

1. You are informed that the date of delivery of corned beef, roast beef, corned-beef hash, and issue bacon which your contracts required you to have completed by February 28, 1919, has been extended to permit delivery on or before March 31, 1919.

2. You are further advised that none of the above-mentioned commodities over and above the quantities noted on February contracts will be required by this office. It will

therefore be necessary for you to discontinue production immediately on such commodities which are not intended to apply against the February contract. Should, however, you have any issue bacon which is now in smoke and which is in excess of the amount required for February delivery, same will be accepted. Under no condition will any more bacon be placed in smoke for this office.

3. It is the intention of this office to enter into negotiation with your firm with a view of making settlement for such material as you now actually have on hand which can not be utilized after completion of the February contract.

4. It will not be necessary to communicate with this office either in person or by correspondence with a view to making any arrangements other than those outlined herein.

5. As soon as possible this office will call upon you for certain information, upon receipt of which negotiation will begin. In the meantime you are instructed to use every effort to dispose of such material as you now have on hand, in order that adjustment may be quickly made. This office will proceed with this work as rapidly as is consistent with other business connected herewith.

By authority of the Director of Purchase and Storage.

A. D. KNISKERN,
Brigadier General, Quartermaster Corps,
Zone Supply Officer.
O. F. SKILES,
Major, Quartermaster Corps.

OFS-JW.

XX. The United States took none of the packing-house products for March, 1919, delivery covered by the correspondence described in Findings XIII to XIX, inclusive, and the plaintiff filed this suit to recover damages sustained in preparation for making such March, 1919, deliveries. With a view to the elimination of controversial questions as to damages, Government accountants visited the plants and offices of Jacob Dold Packing Company and spent a month or six weeks in the fall of 1924 there, examining the books, records, vouchers, etc., of Jacob Dold Packing Company. As a result of this examination a report was submitted by said accountants dated November 30, 1925, showing the plaintiff's cost of production of canned bacon for March, 1919, deliveries, and the amounts realized from sales, the loss on materials and supplies, and the miscellaneous expenses applicable to such production, showing a net loss to the plaintiff

of $20,626.81. This report has been placed in evidence and the plaintiff has reduced its claim to the amount stated therein.

XXI. The loss sustained by Jacob Dold Packing Company by reason of the failure of the United States to take the packing-house products for March, 1919, delivery covered by correspondence contained in Findings XIII to XIX, inclusive, was as follows:

CANNED BACON

Cost:	
60,410 lbs. @ 42.97¢	$25,958.18
Plus remuneration of 2½% in lieu of certain administration expenses	648.95
	26,607.13
Realized from sales:	
Net amount realized from sales after deducting selling costs, 60,410 lbs. @ 20.45¢	12,353.85
Net loss on canned bacon	14,253.28

MATERIALS AND SUPPLIES

Net loss on materials and supplies purchased and on hand for completion of allotment for March, 1919	6,373.53
Total compensation due plaintiff	20,626.81

The court decided that plaintiff was entitled to recover $20,626.81.

GREEN, *Judge*, delivered the opinion to the court:

So far as the principles upon which recovery is sought in this case are concerned, it is similar to the cases of *Swift & Co.* v. *United States*, 59 C. Cls. 364, 270 U. S. 124, and *Libby, McNeill & Libby* v. *United States*, 65 C. Cls. 341, which control the decision herein. The action is based upon a contract made by the Government for delivery to it by the plaintiff of certain meat products. At the close of the World War, the Government found it had no use for the product involved herein and declined to receive it, instructing the plaintiff "to use every effort to dispose of such material as you now have on hand, in order that adjustment may be quickly made." This the plaintiff did. No claim is

Opinion of the Court

made on behalf of the defendant that it is not liable herein for whatever loss the plaintiff sustained by reason of the failure of the Government to carry out the contract on its part. The defense is in substance that by reason of failure to properly authenticate the entries made in plaintiff's books, which are relied upon by plaintiff, that the amount to which the plaintiff is entitled is not shown by the evidence and therefore the defendant is entitled to judgment.

We do not think it is necessary to consider this defense at length and in detail. The great weight of authority is to the effect that where the books of account, upon which the case is based, involve, as in the case at bar, an enormous number of entries, it is sufficient if they are verified on the stand by a supervising officer who knew them to be the books of regular entries kept in the establishment and which were relied upon in the regular course of the business. The plaintiff complied with this requirement.

It is also objected that the amount of plaintiff's loss was computed from the books of plaintiff by Government accountants, and it is urged that the fact that it was so determined is a reason for excluding the testimony of these accountants. This objection also must be overruled. It is necessary that such computation or calculation be made, and in the absence of other evidence the books of the plaintiff constitute the best source from which to make it. Moreover, professional or skilled accountants are the only persons who are competent to make such a calculation or computation when books are used which include entries by the hundreds or thousands. It is well settled that an expert accountant may testify to the result of a calculation made from voluminous entries. Wigmore on Evidence, sec. 1230.

It will be observed there is no pretense that defendant has, upon the merits of the case, any defense whatever. The plaintiff has, without any reasonable cause, been deprived of just compensation for many years. This court is powerless to enter any penalty when defenses are interposed for no other purpose except delay. It can not even award interest in cases of this nature, and the ultimate conclusion of the case must be merely a judgment for the plaintiff for the

amount due it in 1919. We mention this matter in case a further delay should ensue by reason of proceedings in a higher court which may have power to inflict a penalty for such action.

An order giving the plaintiff judgment for the amount found due to it by defendant's accountants will accordingly be entered.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

CREDE H. CALHOUN, ADMINISTRATOR OF THE ESTATE OF FRANK FRAZIER, DECEASED, v. THE UNITED STATES

[No. F-251. Decided December 3, 1928]

On the Proofs

Panama Canal pay; deduction of military pay; retired pay of enlisted man.—The retired pay of an enlisted man of the Marine Corps is not "official salary" within the meaning of section 4 of the act of August 24, 1912, establishing a permanent organization for the Panama Canal, and providing for the deduction from the salary or compensation of its employees the official salary, if any, paid them for naval or military service.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. M. C. Masterson* and *Frank J. Keating* were on the brief.

The court made special findings of fact, as follows:

I. Frank Frazier was on June 23, 1909, placed on the retired list of the United States Marine Corps as a first sergeant after a service of thirty years. He performed active duty in that capacity in time of war from July 13,

1917, to May 15, 1919. During the time covered by this claim he has been paid as such at the rate of $94.50, less 20 cents for hospital fund, or $94.30 a month.

II. Frank Frazier was originally employed in the United States for the commissary division of the Panama Canal Railroad Company for service on the Isthmus. He sailed from New York August 4, 1910, and arrived on the Canal Zone August 11, 1910, but was transferred to the Isthmian Canal Commission January 19, 1912. From that time to the date of his death, November 1, 1927, he remained in the employment of the Panama Canal, with the exception of the period from June 15, 1917, to May 23, 1919, when he re-entered the military service in time of war. Prior to September 1, 1923, he received salary at various rates up to a maximum of $220 a month and received his salary in full without any deduction of his retired Marine Corps pay. His salary was at the rate of $152.09 a month from September 1, 1923, to June 30, 1924, and at the rate of $175 a month from July 1, 1924, to the date of his death, November 1, 1927.

From all payments at those rates, respectively, made to him as a civil employee of the Panama Canal there was deducted from September 1, 1923, to November 1, 1927, his Marine Corps retired pay of $94.50 a month, and only the balance of his civil salary paid him. Such deductions of Marine Corps retired pay for the period in question amount to $4,567.50.

III. The original plaintiff, Frank Frazier, died November 1, 1927, while still in the employment of the Panama Canal and while a resident of and domiciled in the Canal Zone. The present plaintiff, Crede H. Calhoun, has been duly appointed by the District Court of the Canal Zone, Balboa Division, administrator of his estate.

The court decided that plaintiff was entitled to recover $4,567.50.

Moss, *Judge*, delivered the opinion of the court:

Plaintiff's decedent, Frank Frazier, was on June 23, 1909, placed on the retired list of the United States Marine Corps

as a first sergeant, after a service of thirty years, and, except for a short period during the World War, when he was on active duty, he remained on the retired list until the date of his death on November 1, 1927. In 1910 he accepted employment in the service of the United States in connection with the Panama Canal operations and remained in that service, with the exception of the period just mentioned, until the date of his death and received both his retired pay and his compensation as a civil employee of the Panama Canal until September, 1923. From and after that date plaintiff's pay as a retired enlisted man was regularly deducted from his salary as an employee of the Panama Canal, under a ruling of the Comptroller General. This is an action by the administrator of decedent's estate to recover the amount so deducted, $4,567.50.

Section 4 of the act of August 24, 1912, 37 Stat. 561, establishing a permanent organization for the Panama Canal, provides in part as follows:

"If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this act."

The question for determination is whether or not the provisions of this statute were meant to apply to a *retired* enlisted man.

In December, 1919, the Comptroller of the Treasury, Judge Warwick, held on this point (26 Comp. Dec. 209, 211) that retired enlisted men are not in the military or naval service of the United States within the meaning of the act of August 24, 1912, "to the extent that their pay as such is comprehended within the term 'official salary,'" and that they might be employed by the Panama Canal without deducting their retired pay from their compensation as such employees. Under this construction of the law plaintiff's decedent continued thereafter to receive his salary (as he had theretofore) without the deduction of his retired pay, until September 28, 1923, on which date the

Comptroller General overruled the former decision of the Comptroller of the Treasury, and held that retired enlisted men of the Army or Navy are persons within the military or naval service within the meaning of the act of 1912, and that their compensation from the canal is subject to deduction of their retired pay. This decision met with the strenuous objection of the Secretary of War, and on January 29, 1924, he sent a letter to the chairman of the Committee on Interstate and Foreign Commerce, House of Representatives, recommending that appropriate legislation be enacted permitting employment of retired enlisted men in the service of the Panama Canal without deducting their retired pay. In this letter it is stated, "In view of the construction which has been given to existing law, the Panama Canal feels that there should be enacted statutory authority for continuance of its past policy and practice of employing retired enlisted men and paying them their respective salaries without deduction of the retired pay from the salary." In obedience to this recommendation Congress enacted a statute, approved May 31, 1924, 43 Stat. 245, amending the act of July 31, 1894, by adding thereto the following sentence, "Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement." Thereafter the Comptroller General held (4 Comp. Gen. 510) that not withstanding the act of May, 1924, the deduction of the retired pay under the act of 1912 would have to be continued. It should be mentioned in this connection, as tending to illustrate the policy of Congress on the subject of the deduction of the retired pay of enlisted men, that in August, 1916, Congress amended section 6 of the act of May 10, 1916, 39 Stat. 120, which was an act making appropriation for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1917, by pro-

viding "That unless otherwise specially authorized by law, no money appropriated by this or any other act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of $2,000 per annum, but this shall not apply to *retired officers* or *enlisted men* of the Army, Navy, Marine Corps, or Coast Guard, * * *." (Our italics.) Prior thereto, and to the same effect, is the deficiency appropriation act of March, 1909, 35 Stat. 931, wherein it was provided, "Authority is hereby granted for the payment of salaries and wages accrued or hereafter earned of retired Army and Navy officers, and enlisted men now in the employment of the Isthmian Canal Commission, in addition to their retired pay, where their compensation under such employment does not exceed $2,500 per annum." After the decision of the Comptroller General holding that the act of May 31, 1924, did not affect the status of retired enlisted men under the act of 1912, the question was again considered by Congress, which in March, 1928, enacted a statute providing in part that section 4 of the Panama Canal act "shall not be construed as requiring the deduction of the retired pay or allowances of any retired warrant officer or enlisted man of the Army, Navy, Marine Corps, or Coast Guard * * * from the amount of the salary or compensation provided by or fixed under the terms of the Panama Canal act, as amended." From the date of the Panama Canal act in 1912 and until the decision of the Comptroller General in 1923, throughout a period of eleven years, no such deduction had ever been made. Congress had repeatedly and consistently indicated its policy on the subject, and by the amendatory act of May 31, 1924, had expressly declared that policy. In the enactment of the recent act Congress has placed a legislative construction upon its own prior act by declaring that said act *shall not be construed* as applying to a retired enlisted man. Aside, however, from this conclusion, we are of the opinion that the language used in the act of 1912 clearly indicates that the act was not

intended to apply to retired enlisted men. It will be noted "that the amount of official salary paid to any such person shall be deducted * * *." "Salary," as defined in the Standard Dictionary, is a "periodical allowance made as compensation to a person, for his official or professional service, or for his regular work." Salary is current pay to a person *for his regular work.* Retired pay is not compensation for service performed. As used in the military and naval service, retired pay is a gratuity given in worthy cases in recognition of past services, for which no service whatever is rendered, and is usually in a sum less than the active-service pay. Essentially, it is a pension. Chief Justice Nott in the case of *Geddes* v. *United States*, 38 C. Cls. 428, in an opinion construing a similar statute said, "As a matter of fact, the pay of a retired officer is not compensation; and it follows as a matter of law that the salary of the chief clerk of the Department of Agriculture was not 'additional compensation.'" The opinion contained the further statement, "It is well settled that an officer on the retired list owes no service to the Government in time of peace; that if called into service in time of war he returns thereby to the active list and receives full pay." In the *Collins case*, 15 C. Cls. 22, 40, referred to in Chief Justice Nott's opinion, it was stated that the pay of a retired officer "is not given as compensation for discharging the duties of any office during the period for which it is to be paid, but rather as a bounty and in the nature of a pension for services to his country previously performed."

We have reached the conclusion that the pay received by retired enlisted men in the military or naval service of the United States is not *official salary* as that term is used in the act of August 24, 1912. We are of the opinion that plaintiff is entitled to recover, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

R. L. BRADLEY v. THE UNITED STATES

[No. D-349. Decided December 3, 1928]

On the Proofs

Breach of contract; damages.—Damages ascertained and allowed for breach of contract by the Government in failure to deliver manure collected at Camp Shelby, Miss.

Same; degree of proof.—Where a contract has been breached and a loss thereby sustained, the degree of proof required as to the amount of damages is that of reasonable accuracy.

The Reporter's statement of the case:

Mr. C. C. Calhoun for the plaintiff. *Leftwich & Tubb* were on the brief.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff, R. L. Bradley, is a citizen of the United States and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the United States.

II. On the 19th day of March, 1918, the plaintiff entered into a contract with the defendant, through its duly authorized agent, George H. Weller, major, Quartermaster Corps, United States Army, under the terms of which plaintiff purchased of defendant and agreed to dispose of all manure from public animals collected at Camp Shelby, Miss., including the auxiliary remount depot, during the period commencing April 1st, 1918, and ending June 30, 1919, and to pay for such manure at the rate of 12½ cents per calendar month for each animal (horses and mules), to be determined in the following way: The average daily number of animals to be determined at the end of each calendar month and payment to be made for each calendar month on the basis of this average to the camp quartermaster within five days from the date of delivery of the bill to the purchaser or his representative. The defendant agreed to deliver the manure, f. o. b. railroad cars at the railroad siding, at or

near said camp (or remount depot), at a point selected by the commanding officer, or at the option of the defendant the said manure could be dumped on a compost pile on a farm, to be provided by the plaintiff, within three miles of the camp. A copy of said contract is attached to the petition, marked "Exhibit A," and made a part of this finding by reference.

III. During the period from April to December, 1918, there was a daily average of 9,000 animals (horses and mules) at said camp, and during that period of nine months there was collectible from said animals a monthly average of 6,750 tons of manure, or a total of 60,750 tons for said period.

IV. During the early period of this contract deliveries were made at the railroad siding and on railroad cars furnished by the plaintiff, and during the months from April to December, 1918, inclusive, there was delivered and paid for by the plaintiff a total of 15,000 tons of manure collected at the camp and auxiliary remount depot.

V. The plaintiff purchased three separate tracts of land within three miles of the camp, but the defendant declined and refused to make delivery at the plaintiff's farms.

VI. During the summer of 1918 an epidemic of glanders affected about 100 horses in the remount depot. These animals were segregated and placed in a separate pen and the manure collected from this pen was burned and destroyed, and is not included in the quantity to be delivered under the contract.

VII. During the period from January to June, 1919, there was a daily average of 3,000 animals (horses and mules) at the said camp and remount depot, and during that period of six months there was collectible from said 3,000 animals a monthly average of 2,250 tons of manure, or a total of 13,500 tons for the six-month period. During the period from January to June, 1919, there were no deliveries of manure collected at the said camp, and the defendant declined and refused to deliver to the plaintiff at the railroad cars or at the farms owned by him, but, on the contrary, collected the manure and deposited it on a compost pile at a place other than the farms of the said plaintiff, poured oil upon the compost pile and attempted to dispose of it by burning.

VIII. During the contract period there was retained and used by the defendant a total of 1,700 tons of manure collected at said camp for the fertilization and development of the gardens and farms of said camp, and the defendant duly credited the paintiff with the value of said manure.

IX. The plaintiff had orders, and there was a market, for the manure collected and undelivered, and the plaintiff provided sufficient cars for the loading and disposition of manure tendered to him.

X. The reasonable market value of said manure collectible and collected during the period of the contract was $1.00 net per ton, f. o. b. cars at said camp.

XI. The daily average number of animals (horses and mules) for the first nine months was 9,000, and the average monthly collection of manure was 1,500 pounds per animal, making 60,750 tons for the nine months' period. From this amount 15,000 tons were delivered f. o. b. cars, leaving a balance of 45,750 tons undelivered. The daily average number of animals (horses and mules) for the last six months was 3,000, and the average monthly collection of manure was 1,500 pounds per animal, none of which was delivered. The total undelivered amount for the entire period of the contract was 59,250 tons, from which must be deducted the amount of 1,700 tons used on the camp farms, leaving a balance of 57,550 tons collected and undelivered, which at $1.00 a ton net f. o. b. cars at the camp siding would be $57,550. The total number of animals at the camp during the entire period of the contract was 99,000, and at the rate of 12½ cents per animal amounts to $12,375.00, which the contractor would have paid had all the manure been delivered. This amount deducted from the net amount he would have derived from the sale of the manure, had it been delivered, leaves a balance of $45,175.00.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

During the war, on March 19, 1918, the plaintiff contracted with the defendant to purchase and dispose of all manure collected from public animals, i. e., horses and

mules, at Camp Shelby, Mississippi. The manure was to be delivered by the defendant to the plaintiff "f. o. b. railroad cars at the railroad siding or dumped on a compost pile on a farm to be provided by the plaintiff within three miles of the camp." During the early period of the contract the defendant observed its terms with reasonable accuracy. For some reason, not ascertainable from the record, the defendant soon disregarded its contractual obligations, and did not, and apparently made no effort to, comply with the stipulations of the contract. The plaintiff made the necessary preparations to accept and dispose of the manure, was active in securing sufficient cars to affect its transportation, and possessed three farms within three miles of the camp whereon it might have been deposited.

We have said the court can not from the record ascribe a reason for the defendant's default. The observation is predicated upon the absence of a legal reason. Inconvenience and fancied hardships are obviously not legitimate defenses. If the defendant discovered subsequent to making the contract that onerous duties had been assumed, it may not escape liability by yielding to a course of performance which imposes a loss upon the plaintiff, notwithstanding the supposed benefits which accrued to the defendant. No attempt is made to dispute the positive fact that the defendant did not comply with the obligations of its contract. No assertion is made that the plaintiff received anywise near the quantity of manure he was entitled to receive, and nowhere does it appear that the plaintiff was at any time in default in observing his obligations under the contract. Manure was not delivered, except as stated in the findings, to the plaintiff. The defendant for its own convenience diverted deliveries and by its own acts and conduct disposed of huge quantities of manure and in its own adopted way to the prejudice of plaintiff's rights under the contract. Instead of making deliveries as the contract provided the defendant deposited the manure in a huge compost pile, not upon the farms of the plaintiff, but upon a site selected by itself; poured oil thereon and attempted to consume it by burning. It is difficult to conceive of a more flagrant disregard of contractual obligations than obtains

in this case. The sanitation of the camp and the health of the surrounding community were involved in the terms of the contract. The disposal of manure from a total of 99,000 animals was an undertaking of no small magnitude; it required financial outlay and preliminary preparation vast in extent. The plaintiff, as previously noted, purchased three separate farms, all within three miles of the camp, and not a single delivery was made thereon by the defendant. Plaintiff had contracted for the sale of the manure, had customers ready and willing to buy and transport it away from the camp and his farms, and was prevented from realizing the purchase price. The defendant seems to seriously contend that the defendant's deliveries under the contract obtained except in so far as prevented from so doing by an epidemic of glanders among the horses, and in any event the defendant by the express terms of the contract was only bound to deliver such quantities of manure as was *collected*, not the quantity produced.

As to the first contention, we think it disposed of by the findings. The court makes allowance for the epidemic of glanders. With respect to the remaining question, there is no disagreement. Of course the defendant guaranteed no specific quantity of manure, and the plaintiff was to receive only the quantity collected. The gravamen of the complaint is predicated upon this very basis; the existing difficulty lies in the determination of the amount collected, not that any was not collected. In the ascertainment of damages two factors are indisputably present; First, that a huge quantity of manure was collected at the camp and only a portion of the same was delivered to the plaintiff. The daily average number of horses and mules at the camp for the first nine months of the contract period was 9,000. From each animal there was collected a total of 1,500 pounds, or a total quantity for the period of 60,750 tons. Fifteen thousand tons were delivered as per contract, leaving a balance of 45,750 tons undelivered. The witnesses whose testimony forms the basis of the computation—witnesses of long experience in handling horses and mules—fix a greater quantity than given in the findings. The court from the record deducts from a basis of production a liberal allowance upon the theory

Syllabus

that production is not the equivalent of collection, and a reasonable difference is allowable because of a manifest inability to deliver full quantities of production. In other words, taking the average production as proven by a computation predicated upon the amount delivered during a stated period and the number of animals present at the camp during that period, the basis of individual collection is ascertainable within reasonable bounds. With the result thus attained, more than corroborated by expert testimony, and making a wholesome allowance for wastage and inability to deliver any more than was collected, we think the quantity which was collected but not delivered is, to say the least, well within the figures given in the findings. In our view of the facts the basis adopted eliminates conjecture and speculation, and produces a loss proven by reasonable certainty. The plaintiff is not to be denied a judgment because of difficulties in ascertaining damages. If the proof establishes a loss within a reasonable degree of accuracy and satisfies the court that beyond doubt a loss of this extent obtained, plaintiff is entitled to judgment for the amount. The plaintiff had customers ready and willing to purchase from him at $1 per ton. The record sustains a market value of $1 per ton. We think that under Finding XI the plaintiff is entitled to a judgment for $45,175. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

SAUNDERS SYSTEM WASHINGTON CO. v. THE UNITED STATES

[No. F-402. Decided December 3, 1928]

On the Proofs

Special tax; operating or renting automobiles.—Section 1001 (11) of the revenue act of 1921, imposing a tax on "persons carrying on the business of operating or renting passenger automobiles for hire," applies to those who are engaged in the business of letting or renting passenger automobiles without drivers, under an agreement by which they are to receive payment for the use of the cars.

The Reporter's statement of the case:

Messrs. Everett C. Wilson and *Edward Clifford* for the plaintiff. *Mr. Benjamin B. Pettus* and *Colladay, Clifford & Pettus* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation doing business in the city of Washington, organized August 6, 1923, and acquired all the assets and liabilities of a partnership previously engaged in business in the same city under the same name.

II. Plaintiff has at all times borne true allegiance to the Government of the United States, is the sole owner of the claim sued upon herein, and has made no transfer or assignment thereof.

III. The plaintiff and its predecessor partnership during the period June 30, 1922, to and including June 30, 1926, were engaged in the business of letting or renting passenger automobiles without drivers under what is commonly known as the "drive-it-yourself" plan, whereby said automobiles are let or rented to persons for use in their business or for pleasure under an agreement on the part of the customer that he will not drive or permit another to drive said automobile as a private or public carrier of passengers for hire. A written contract was usually signed by the customer.

IV. In operating under this contract, temporary possession of the automobile was transferred to the customer, who did his own driving. No drivers were furnished with the cars. Plaintiff's cars are not used in any taxicab business or to carry persons for hire between any designated points, or used as busses for hire for sight-seeing purposes. A minimum charge of 20 or 25 cents per hour was made for the cars in addition to which the customers paid for the use of the automobiles on the mileage basis, and the customer returns the cars after they are used.

V. In compliance with the provisions of law in effect during the period in question, the plaintiff under protest purchased automobile special tax stamps and paid certain pen-

alties in connection therewith to the collector of internal revenue at Baltimore, Maryland, as follows:

Period covered	Total payments	Date paid
Year ended June 30, 1923	$35.54	Oct. 17, 1924
Year ended June 30, 1924	276.19	Oct. 17, 1924
Year ended June 30, 1925	334.28	Oct. 19, 1924 Aug. 3, 1925
Year ended June 30, 1926	380.00	Aug. 3, 1925
	1,026.01	

VI. In September, 1926, plaintiff filed claims for the refund of the taxes paid as aforesaid with interest, which claims the Commissioner of Internal Revenue rejected on November 18, 1926.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

Section 1001 (11) of the revenue act of 1921, 42 Stat. 296, was in force during the period involved in this case and is as follows:

"Persons carrying on the business of operating or renting passenger automobiles for hire shall pay ten dollars for each such automobile having a seating capacity of more than two and not more than seven, and twenty dollars for each such automobile having a seating capacity of more than seven."

The plaintiff contends that this provision is ambiguous and that Congress did not intend thereby to impose a tax upon persons who let automobiles without drivers to those who intend to do their own driving.

We can not agree with this contention. The law appears to us to be plain and unambiguous. We think it clear that it applies to persons and corporations, who, in the language of the stipulation and as set out in the findings, were "engaged in the business of letting or renting passenger automobiles without drivers" under an agreement by which they were to receive payment for the use of the cars.

The commissioner correctly assessed the tax in controversy against the plaintiff and it is ordered that its petition be dismissed.

FRANK C. MATTERN AND FRANK L. CARRE, EXECUTORS OF THE ESTATE OF SAMUEL F. HOUSEMAN, DECEASED, v. THE UNITED STATES

[No. H-198. Decided December 3, 1928]

On the Proofs

Eminent domain; interest as compensation; computation.—Where property is taken under eminent domain and suit is brought to recover full compensation, the plaintiff is entitled as part of such compensation to interest on the value of the property taken from the time it was taken, applying a partial payment first to the accumulated interest and then to the principal. Such recovery is not properly interest within the prohibition of section 177 of the Judicial Code. *Phelps* v. *United States*, 274 U. S. 341, 344.

The Reporter's statement of the case:

Messrs. John A. Kratz, Theodore S. Paul and *Charles Henry Butler*, and *Pepper, Bodine, Stokes & Schoch* for the plaintiffs.

Mr. William W. Scott, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiffs are the duly qualified executors of the estate of Samuel F. Houseman, who, in his lifetime, was the owner of an undivided one-third interest in a certain tract of land in the city of Philadelphia, known as "Cabin Island."

II. On September 23, 1918, while the testator was the owner of the said undivided one-third interest in said tract, the defendant, in accordance with a proclamation of the President of the United States acting by the Secretary of the Navy, took possession and still retains all of said tract, such proceedings being duly authorized by law.

III. On May 10, 1921, the President, through underofficials of the Government, determined the amount of just compensation due from the United States to the plaintiffs for their

interest in said tract to be the sum of $81,018.67, but did not determine the value thereof at the time the same was taken. On July 1, 1921, 75 per cent of this award, being $60,764.00, was received by the plaintiffs from the defendant under protest, the plaintiffs asserting that they were entitled to the finding of the value of their interest in the land as of September 23, 1918, date of taking, and to an award of the amount of such valuation with interest from that date.

IV. The fair and reasonable value of plaintiff's interest in the land so taken on September 23, 1918, was $81,018.67.

The court decided that plaintiffs were entitled to recover, their recovery to be measured as follows, with interest on the balance from July 1, 1921, to date of final payment:

Amount due Sept. 23, 1918, when land was taken	$81, 018. 67
Interest at 6 per cent from Sept. 23, 1918, to July 1, 1921	13, 476. 10
Total	94, 494. 77
Less payment July 1, 1921	60, 764. 00
Balance due July 1, 1921	33, 730. 77

MEMORANDUM BY THE COURT

This case is presented for formal judgment, there being no contention between the attorneys of the several parties to the action as to their rights.

The original dispute between the plaintiffs and the defendant was as to whether plaintiffs were entitled to recover the value of the property involved at the time it was taken, together with interest thereon from such time. Any question that may have at one time existed as to the rule which should be applied herein has now been settled in plaintiffs' favor by the cases of *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299; *Liggett & Myers* v. *United States*, 274 U. S. 215; *Phelps* v. *United States*, 274 U. S. 341.

Judgment will be entered accordingly. It is so ordered.

SLOAN DANENHOWER & CO. v. THE UNITED STATES

[No. F-96. Decided December 10, 1928]

On the Proofs

Contract for salvage services; cessation of operations; unauthorized stripping of apparel.—Plaintiff agreed in writing to salvage a Navy barge, the Government to pay "actual expenses of operation whether successful or not, * * * provided expenses paid will not be in excess of $35,000." In the course of operations the barge was damaged by a storm and the salvaging ceased. To a radiogram by plaintiff recommending stripping and abandoning the Secretary of the Navy replied by radio directing that the salvage stop and the salvaged material be turned in to the district commandant. Thereupon the plaintiff stripped the wrecked barge of its apparel and delivered the same to the commandant. *Held*, that plaintiff was not authorized to proceed to the stripping and was not entitled to recover the expense thereof in addition to the sum accepted in settlement of the written contract.

The Reporter's statement of the case:

Messrs. Harry A. Grant and *H. M. Foote* for the plaintiff.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation, engaged in the business of marine wrecking and salvaging; is the sole owner of this claim, and has at all times been loyal to the United States.

II. Sloan Danenhower, the president of plaintiff corporation, was graduated from the United States Naval Academy in 1907, served on board several vessels, and was in command of various United States submarines. He resigned in 1911. During the World War he reentered the naval service and was sent to France as wreck master of the United States naval force in France, and was discharged from the naval service as lieutenant commander. He is a diver.

Reporter's Statement of the Case

III. In March, 1921, said Danenhower was at Nassau, in the Bahama Islands, where he learned from the American consul that United States water barge *No. 31* was in distress off Cat Island. He chartered and provisioned a vessel, equipped her with certain items of diving apparatus, and proceeded to the wreck of said barge, arriving alongside on March 11, 1921. He found it ashore and abandoned, all portable articles thereon having been removed by officers of the barge. He took charge of the vessel. On the same day an officer of said barge came alongside and boarded her; he discussed with Danenhower about salvaging her. Danenhower told said officer that he was proceeding with a diver's examination and an attempt at salvaging. Said officer said, "All right, good luck to you," and departed in the sloop in which he came. Danenhower then took up quarters on board the wreck and transferred provisions, diving apparatus, and gear to her.

IV. He then sent his chartered vessel back to Nassau with a cablegram to the Secretary of the Navy as follows:

"Navy water barge thirty-one twenty-four forty-two seventy-five forty-eight exposed position all compartments flooded. Divers report holes in forepeak hold fire and engine rooms. All hands abandoned ship. Found vessel deserted. Will remain aboard preventing looting proceeding salvage. Offer float. Actual expenses guaranteed plus bonus thirty-three thousand if successful or days work regular schedule. Request telegraphic decision Nassau and confirmation authority remain in charge of operations."

V. On March 31, 1921, plaintiff's president, Sloan Danenhower, being at Key West, Florida, received the following letter from J. L. Latimer, captain, U. S. N. commandant, seventh naval district, at Key West:

"Subject: The salvage of Navy water barge *No. 31.*

"I am authorized by the Bureau of Construction and Repair, Navy Department, to direct you to proceed with salvage of water barge *No. 31*, under the following conditions, namely:

"The department will pay actual expenses of operation whether successful or not and if vessel is delivered at navy yard, Charleston, within forty-five (45) days from the date

of acceptance of this order, will in addition pay bonus provided expenses paid will not be in excess of thirty-five thousand dollars, bonus not in excess of twenty-five thousand dollars, and expenses and bonus together not in excess of fifty thousand dollars.

"Please inform me in writing if you will accept these conditions."

Plaintiff accepted in writing on the same date.

VI. Plaintiff proceeded under said authority, secured equipment, hired labor, and was engaged in salvaging the ship until April 12, 1921, when a storm so damaged the ship as to cause plaintiff to cease operations. He sent to the Secretary of the Navy the following radiogram from Nassau, on April 19, 1921:

"Barge *31* at 4.00 a. m. April twelfth in northwest gale was lifted bodily by heavy sea forty feet to eastward Stop At 7.00 a. m. stern sagged six feet submerging after part breaking bottom and buckling sides of boiler room Stop Can cut at boiler room and float forward end but do not recommend Stop Consider vessel constructive total loss Stop Recommend stripping and abandoning Stop Please radio decision direct"—

and received by radio on board the wreck, on April 22, 1921, the following reply from the Secretary of the Navy:

"2022 refer yours nineteenth April stop salvage period turn in salvaged material to commandant seventh district 0545."

VII. It does not appear from the evidence that plaintiff, prior to the receipt of the radiogram from the Secretary of the Navy referred to in the preceding finding, had salvaged or stripped said barge *No. 31* of any of its apparel. After the receipt of said radiogram plaintiff proceeded to strip said barge of its apparel and loaded the salvaged material, the result of the stripping, on the schooner *Crosland*, then under hire to plaintiff, and on the 11th day of May, 1921, said salvaged material was discharged from said schooner *Crosland* and delivered to defendant's Navy officer at seventh naval district, Key West, the value of which was fixed by competent appraisers at $2,017.63.

Reporter's Statement of the Case

VIII. Plaintiff submitted bills to the Navy Department under three heads, viz:

(a) For expenses incurred prior to signing contract and supported by vouchers	$2,154.49
(b) For expenses incurred under contract of March 31, 1921	34,413.41
(c) Itemized account under contract of March 31, 1921, as amended by radiogram from Secretary of the Navy and received April 22, 1921, heretofore referred to in Finding VI	19,832.42

IX. The Navy Department disallowed claim (a), settled claim (b) for a consideration of $30,000, and took a release therefor as shown by Exhibit X of plaintiff's, as follows:

"From Sloan Danenhower & Company (Inc.), of 11 Broadway, New York, N. Y., to the United States in re salvage of U. S. Navy water barge *No. 31*, ashore on Cat Island, in the Bahamas, in March and April, 1921, under contract dated March 31, 1921

"Whereas, under an agreement entered into by the commandant of the seventh naval district on behalf of the Navy Department with Sloan Danenhower & Co. (Inc.), of 11 Broadway, New York, N. Y., dated March 31, 1921, the said Sloan Danenhower & Co. was authorized to salvage U. S. Navy water barge *No. 31*, ashore on Cat Island, in the Bahamas, in March and April, 1921, under conditions and terms in said agreement set out; and

"Whereas the said Sloan Danenhower & Co. (Inc.), did undertake to salvage the said U. S. Navy water barge *No. 31* and did incur by reason thereof certain expenses, for which they are entitled to be paid in accordance with the terms of said contract; and

"Whereas, on account of said services rendered and expenditures incurred under said contract, the said Sloan Danenhower & Co. has made claim against the department and has agreed to accept the sum of thirty thousand dollars ($30,000) in full settlement and satisfaction of all claims, charges, and demands whatsoever arising under said contract; and

"Whereas, the Secretary of the Navy, under authority conferred upon him by law, has determined that the said Sloan Danenhower & Co. should be paid on account of said services and expenditures incurred by it the said sum of thirty thousand dollars ($30,000) to which it has been adjudged to be entitled in final settlement of its claim, the receipt of which is hereby acknowledged, the said claimant for itself, its successors, and assigns does hereby release and

forever discharge the United States of and from all manner of debts, sums of money, claims, and demands whatsoever at law and in equity arising out of said services rendered and said expenditures incurred by the said Sloan Danenhower & Co. under the agreement of March 31, 1921, for the salvage of U. S. Navy water barge *No. 31*.

"In witness whereof the claimant, the said Sloan Danenhower & Co. (Inc.), of 11 Broadway, New York, N. Y., has authorized its president and secretary to execute these presents and to affix its corporate seal hereto this ——— day of August, 1921."

With reference to claim (c), defendant offered plaintiff $1,000 in settlement thereof, which plaintiff refused to accept.

X. The action by the Navy Department is more specifically shown in a letter to plaintiff of April 14, 1925, from the Judge Advocate General of the Navy, marked Exhibit 8, and by reference made part of this finding, as follows:

"I acknowledge receipt of your letter of April 6, 1925, relative to claims arising out of the services rendered the department in connection with the U. S. Navy water barge *No. 31* when aground on Cat Island in the Bahamas in March and April, 1921.

"These claims, three in number, designated as A, B, and C, were thoroughly considered when submitted in 1921 and action taken with respect to each of them in accordance with the result of the investigations made, as follows:

"The claim designated as A in the sum of $2,154.49 for reimbursement for expenses incurred in preliminary work in connection with the salvage of the stranded barge previous to the authority given under the salvage agreement of March 31, 1921, was disapproved.

"The claim designated as B for reimbursement for expenditures incurred in the attempt to salvage the barge, under the terms and conditions of your contract with the department of March 31, 1921, in the sum of $34,413.41, was adjusted, approved, and paid in the sum of $30,000.00. This amount was accepted by you in full settlement and discharge of the claim.

"The claim designated as C, as compensation for stripping water barge *No. 31* after salvage work had been abandoned, and for conveying the salvage material to Key West, Florida, was adjusted and approved by the department in the sum of $1,000.00, which amount, however, you declined to accept.

Opinion of the Court

"In view of the foregoing, it seems that no further action with respect to this matter is required by the department."

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff in its petition seeks to recover the sum of $21,-986.91 for services which it claims to have rendered in an attempt to salvage defendant's water barge *No. 31*. While attached to the Navy squadron the said barge became stranded on Cat Island, one of the Bahama group, off Nassau. She settled on the rocks, the pinnacles of which punctured her bottom. The commander of the fleet early March 7, 1921, caused to be removed from the stranded barge all portable material and took off the officers and crew.

Plaintiff proceeded to the wreck of said barge, arriving alongside on March 11, 1921, and found the barge ashore and abandoned, all portable articles thereon having been theretofore removed.

On the same day an officer of said barge came alongside and boarded her and talked with Sloan Danenhower, president of plaintiff corporation, about salvaging the barge. Danenhower told said officer that he was proceeding with a diver's examination and an attempt at salvage. Said officer said "All right; good luck to you," and departed in the sloop in which he came.

Danenhower then took up quarters on board the wreck and transferred provisions, diving apparatus, and gear to her. On this conversation with the said officer plaintiff bases its right to recover for the bill referred to in Finding VIII, viz:

(a) For expenses incurred prior to signing contract and supported by vouchers------------------------------ $2, 154. 49

We find nothing in this loose conversation with the officer to sustain any agreement with defendant covering salvage. Even if said loose talk could be construed into an understanding, with reference to salvaging the water barge, there was no evidence that the said officer had any authority to bind defendant.

Opinion of the Court

After making an examination of the wreck, plaintiff wired to the Secretary of the Navy as follows:

"Navy water barge thirty-one twenty-four forty-two seventy-five forty-eight exposed position all compartments flooded. Divers report holes in forepeak hold fire and engine rooms. All hands abandoned ship. Found vessel deserted. Will remain aboard preventing looting proceeding salvage. Offer float. Actual expenses guaranteed plus bonus thirty-three thousand if successful or day's work regular schedule. Request telegraphic decision Nassau and confirmation authority remain in charge of operations."

On March 31, 1921, plaintiff's president, Sloan Danenhower, being at Key West, Florida, received the following letter from J. L. Latimer, captain U. S. N. commandant, seventh naval district, at Key West:

"Subject: The salvage of Navy water barge *No. 31*.

"I am authorized by the Bureau of Construction and Repair, Navy Department, to direct you to proceed with salvage of water barge *No. 31*, under the following conditions, namely:

"The department will pay actual expenses of operation whether successful or not, and if vessel is delivered at navy yard, Charleston, within forty-five (45) days from the date of acceptance of this order will in addition pay bonus provided expenses paid will not be in excess of thirty-five thousand dollars, bonus not in excess of twenty-five thousand dollars, and expenses and bonus together not in excess of fifty thousand dollars.

"Please inform me in writing if you will accept these conditions."

Plaintiff accepted the conditions set forth in the above letter on the same date. Plaintiff proceeded under the authority in the said letter, secured equipment, hired labor, and was engaged in salvaging the water barge until April 12, 1921, when a storm so damaged the wrecked water barge as to cause plaintiff to cease operations. Plaintiff then sent to the Secretary of the Navy the following radiogram from Nassau, on April 19, 1921:

"Barge *31* at 4.00 a. m. April twelfth in northwest gale was lifted bodily by heavy sea forty feet to eastward Stop At 7.00 a. m. stern sagged six feet submerging after part

breaking bottom and buckling sides of boiler room Stop Can cut at boiler room and float forward end but do not recommend Stop Consider vessel constructive total loss Stop Recommend stripping and abandoning Stop Please radio decision direct."

On April 22, 1921, the Secretary of the Navy replied to the above by radio, as follows:

"2022 refer your nineteenth April stop salvage period turn in salvaged material to commandant seventh district 0545."

On receipt of the above radiogram, plaintiff proceeded to strip the wrecked barge of its apparel and loaded the salvaged material, the result of the stripping, on the schooner *Crosland*, and delivered the same to defendant at Key West. This stripping of the barge's apparel and delivery at Key West is the basis for plaintiff's bill, referred to in Finding VIII, viz:

(c) Itemized account under contract of March 31, 1921, as amended by radiogram from Secretary of the Navy and received April 22, 1921, heretofore referred to in Finding VI -- $19, 832. 42

We find no direction or authority in the radiogram from the Secretary of the Navy, which the plaintiff received on April 22, 1921, referred to in Finding VI, authorizing or directing the plaintiff to proceed to strip said barge of its apparel.

In view of the fact that the salvage contract of March 31, *supra*, limited plaintiff's expense to $35,000 if unsuccessful, for which it presented a bill of over $34,000, and in view of the further fact that said contract limited the plaintiff's bonus and expense together to $50,000, if plaintiff succeeded in delivering the barge to the navy yard at Charleston, it was indeed a violent assumption on the part of plaintiff to assume that the radiogram of April 22 authorized it to proceed with the stripping of the wreck of apparel valued at $2,017.63 by competent appraisers, and to obligate the defendant to pay the further sum of $19,000, which sum added to plaintiff's bill submitted to the Navy Department, referred to in Finding VIII (b), would exceed the limit of $50,000 for both expense and bonus if successful, provided for in said contract of March 31.

Opinion of the Court

The radiogram was a direct and positive order to stop salvage. Prior to the date of the receipt of this radiogram, it does not appear that plaintiff had stripped or salvaged any of the ship's apparel. The stripping of the ship was a salvage service. Plaintiff had positive orders to "stop salvage." Salvage is defined as follows:

"A salvage service, in the view of the Court of Admiralty, may be described, sufficiently for practical purposes (c), as a service (d) which saves or helps to save maritime property—a vessel, its apparel, cargo, or wreck * * *." Page 2, "The Law of Civil Salvage," Ld. Justice Kennedy.

"Salvage, apart from life salvage, is by the maritime law of England confined to ship, apparel, and cargo, or what has formed part of these, and to freight earned by carriage of cargo. A similar rule seems to be laid down in a decision of the Supreme Court of the United States."—35 Cyc. 733.

Webster's Dictionary defines nautical "apparel" as follows:

"(5) *Naut.* The equipment of a ship, as masts, sails, rigging, anchors, guns, etc."

It is apparent from the above definitions of "salvage" and ship's "apparel" that plaintiff was not authorized by the radiogram which it received from the Secretary of the Navy on April 22, 1921, to proceed to strip the ship of its apparel or to further salvage the ship, other than to turn in the salvaged material already collected to the commandant of the seventh district. As to the order to turn in the salvaged material, it does not appear that plaintiff had stripped or salvaged any of the ship's apparel prior to the receipt of said radiogram.

Therefore, in our opinion, plaintiff's bill, (c) in Finding VIII, should be disallowed for the reason that the basis of the claim is founded on the stripping of the wreck, after the receipt of the radiogram ordering plaintiff to "stop salvage," at which time plaintiff had not salvaged any of the wrecked barge's apparel. Had plaintiff had on hand, at the time of the receipt of said radiogram, any of the ship's apparel which it had salvaged, it was authorized by said radiogram to deliver the salvaged material to the commandant of the seventh district. Had this been the case we would

be compelled to hold that such service was fairly within the scope of the salvage contract between plaintiff and defendant, referred to in Finding V, under which plaintiff submitted its bill to the Navy Department, referred to in Finding VIII, "(b) For expenses incurred under contract of March 31, 1921," under which said contract plaintiff settled its claim and gave a release for the consideration of $30,000, as is shown in Finding IX.

We are of the opinion that plaintiff's petition should be dismissed. It is so ordered and adjudged.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

CHARLES E. KALTENBACH v. THE UNITED STATES

[No. D-583. Decided January 7, 1929]

On the Proofs

Income tax; sale or license of secret process; income; realization upon capital.—Plaintiff's agreement in writing with a corporation that it should have his "shop rights" on a certain process in the weighting of silk, kept secret by him, the process to remain his property, *held* to be a license and not a sale, and the compensation received therefor taxable income and not realization upon capital.

The Reporter's statement of the case:

Messrs. Victor House and *Abbot P. Mills* for the plaintiff. *Mr. George V. A. McCloskey* was on the briefs.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. Alexander H. McCormick* and *Dan M. Jackson* were on the briefs.

The court made special findings of fact, as follows:

I. The plaintiff is a loyal citizen of the United States. He has at all times borne true allegiance to the United States

and has not aided, abetted, or given encouragement to rebellion against it.

II. Prior to 1913 the plaintiff discovered and developed a process for weighting silk by the use of chemicals or metals. This was a secret process and was never patented.

III. The process was used to some slight extent by the firm of Kaltenbach & Stephens, in which plaintiff was employed, but no sale or license was ever made of the process prior to 1919.

IV. Between the years 1913 and 1919, the plaintiff endeavored to prove to his father, the senior partner, and later the larger stockholder, when the partnership was incorporated, and Mr. Stephens, the other partner, the value of his process. The plaintiff's father died in 1918, and Mr. Stephens shortly thereafter, without having authorized the use or purchase of the process. The plaintiff was then made president of the then corporation, and continued to urge the use of his process by the corporation. Finally, in 1919, the stockholders, all relatives of the former partnership, decided to try out the process, and after considerable discussion as to the terms which would compensate the plaintiff if the process was successful, but would safeguard the corporation if the venture was unsuccessful, authorized the plaintiff's uncle, Henry Kaltenbach, to draw up contract, providing for the payment to the plaintiff of 25 per cent of all profits over $100,000 earned during each year for a 3-year period, such contract to be renewable by the corporation at the end of the term if it proved successful. The following is a copy of the contract:

ARTICLES OF AGREEMENT entered into this nineteenth day of August, nineteen hundred and nineteen, between Kaltenbach & Stephens, Inc., a corporation organized and existing under the laws of the State of Delaware, party of the first part, and Charles E. Kaltenbach, of Cranford, in the county of Union and State of New Jersey, party of the second part.

In view of the duties in addition to those of president which devolve upon party of the second part in the conduct and management of the business of the party of the first part, and the desire of the party of the first part to retain the services of the party of the second part for a period

Reporter's Statement of the Case

of years, and to secure the shop rights on any processes that may have been or that may be perfected by the party of the second part while engaged in the service of the party of the first part, it is agreed by and between the parties hereto in consideration of the premises and the payment of the sum of one dollar paid by the party of the first part to the party of the second part, the receipt whereof is hereby acknowledged and the mutual agreements and undertakings hereinafter contained, that the party of the second part shall devote his entire time to the supervision of the purchasing of raw material, the manufacture and disposition of the product of the party of the first part and the general conduct of its affairs; and, further, that the party of the first part shall have what are known as shop rights on any and all processes which the party of the second part has developed or perfected or may develop or perfect while in the service of the party of the first part which can be used in connection with the business and manufacturing operations of the party of the first part, such processes however to be the property of and belong to the party of the second part. And that for the services thus rendered and shop rights thus bestowed, the party of the first part pay to the party of the second part in addition to the salary he now receives as president, 25% of the annual net profits of the party of the first part in excess of one hundred thousand dollars; payment to be made annually after the profits have been ascertained, either in cash or preferred stock of Kaltenbach & Stephens, Inc., as the party of the first part may elect, provided that sufficient be paid the party of the second part in cash to enable him to pay Federal and State income tax on the amount to which he may be entitled under this agreement.

In determining the profits of the party of the first part, it is understood that the present general method of determining the profits shall be continued, with the exception that hereafter at the end of each year the basis of valuation of the inventories shall first be determined upon by the board of directors—that is, as to whether the inventory shall be taken at cost or market, and, for the purpose of determining the amount due to the party of the second part, the net profits shall be taken as then shown by the books before the deduction of any Federal taxes which may be assessed against the party of the first part under the Federal statutes at the time of any adjustment made between the parties hereto.

The period of this agreement shall be for three years beginning on January 1st, 1919, and terminating on Decem-

ber 31st, 1921, provided that at least six (6) calendar months' notice in writing of the termination of this agreement on December 31st, 1921, has been given by either party to this agreement, to the other, on behalf of the party of the first part by the action of its board of directors and the service of such notice upon the party of the second part personally or by mail, and by the party of the second part by the services of such notice on a principal officer of the party of the first part in Newark, New Jersey; otherwise this agreement shall continue until its abrogation by mutual consent or six calendar months' notice in writing by one party to the other in the manner above set forth.

In witness whereof the party of the first part has caused its corporate seal to be hereunto affixed and these presents to be executed on its behalf by its officers duly authorized by its board of directors, and the party of the second part has hereunto set his hand and seal the day and year first above written.

KALTENBACH & STEPHENS, INC.,
By JOHN C. EISELE,
Vice President.
CHARLES E. KALTENBACH.

Attest:
H. J. KALTENBACH,
Secretary.

Signed, sealed, and delivered in the presence of:
THOMAS M. SCHEIDLER.

The above contract expressed the true agreement entered into between the parties thereto. The plaintiff's uncle, Henry Kaltenbach, who drew said contract, was a man of wide business experience and was familiar with contract forms. When he signed the contract plaintiff was about 34 years old, and was a man of unusual intelligence.

V. In 1919, at the time the contract was made, the plaintiff had the intention of acquiring all the stock of said corporation within the next three or four years.

VI. During the three-year period of the contract, 1919–1921, inclusive, the plaintiff installed and used his process to a great extent and received as his payment for using the same under the contract the sum of approximately $530,000 over and above his salary. The contract provided for an extension at the end of the 3-year period, and it was the expectation of the plaintiff that such extension would be

Reporter's Statement of the Case

made by the corporation owing to the profits made on account of it. However, in 1921, a process known as the Swiss Phosphate Foam process was brought to the attention of the plaintiff and its economies over his own process were demonstrated to such an extent that he installed it in the plant of the corporation as a substitute for his own more expensive process. As a result of this installation of the Swiss process at the end of the 3-year period provided in the contract the plaintiff's process no longer was necessary, and the corporation decided not to renew the contract for the use of the plaintiff's process and made a settlement with him for the cancellation of the contract and the payment to him of $10,000.

VII. The plaintiff had constantly the fear before him that the secret of his formula would escape, and for this reason never divulged it to the other officials of the corporation.

VIII. After the contract was drawn up, read, and signed by the parties thereto, the formula for the process was written out, placed in a sealed envelope, and kept hidden either in the safe or in the desk of the plaintiff's office in the plant of the corporation, with directions written thereon by plaintiff stating that the envelope was to be opened in the event of his death. The plaintiff stated that he was very much afraid in making a sale to the corporation of his process that the secret would escape.

IX. The plaintiff placed a minimum valuation on his process of $1,000,000. Other competent and credible witnesses placed a minimum valuation of $2,000,000, and from that to $10,000,000 as of March 1, 1913.

X. On or about March 15, 1920, plaintiff filed his original tax return for the year 1919, wherein there was included in income the sum of $85,000, representing approximately 10 per cent of the corporation's profit after the deduction of Federal taxes for the year 1919. Upon this return a tax of $36,840.76 was duly paid by the plaintiff.

XI. On or about July 31, 1923, plaintiff filed an amended return herein reporting in and as income $40,926.35 instead of the $85,000 above mentioned, to represent 5 per cent of the profits of the corporation for 1919 after deduction of Federal

taxes. Said amended return showed a tax payable of $17,-703.58 instead of $36,840.76 shown by the original return.

XII. If plaintiff's legal contentions respecting the sale character of his agreement with Kaltenbach & Stephens (Inc.) are sustained, the proper and correct tax payable by the plaintiff for the year 1919 is $17,703.58 instead of $36,840.76.

XIII. Contemporaneously with the filing of said amended return and within four years from the time the tax shown by the original return was paid, the plaintiff duly filed herein in writing a claim addressed to the Commissioner of Internal Revenue for the refund of $19,137.18, being the difference between the tax assessed and paid under the original return and the tax payable under the amended return above mentioned.

XIV. More than six months had at the time of the commencement of this suit elapsed since the making and filing of said application for refund, and the Commissioner of Internal Revenue has failed and refused to approve the said claim or to repay or refund to the plaintiff the amount so claimed or any part thereof. Less than five years have elapsed between the payment of the tax mentioned in Finding X, or of parts thereof, and the date of the beginning of this suit.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover the sum of $19,137.18 claimed to have been paid by him in excess of his proper income tax for the calendar year 1919. The controversy herein involves the contract of August 19, 1919, set forth in Finding IV. It is the contention of plaintiff that said contract does not express the true agreement of the parties thereto; that the real agreement between him and Kaltenbach & Stephens, Inc., contemplated a sale of his secret process for weighting silk to said corporation for the sum of $1,000,000. The Government contends that said contract does not effect the sale of the process, but is merely a license to use it so that the

payments received by plaintiff thereunder are income and not realization upon capital.

The contract on its face clearly shows it to be a license for the use of plaintiff's process. There is no ambiguity in the language of the contract. It is clearly expressed, was drafted by plaintiff's uncle, who, as the testimony shows, was a man of wide business experience and familiar with contract forms. The agreement was the subject of repeated conferences between plaintiff and the officials of the corporation. The plaintiff read the contract before signing it. He was about 34 years of age at the time, and appears from the evidence to be a person of unusual intelligence, with a rare facility for expressing himself in well-chosen language.

We have carefully reviewed the testimony and are not satisfied that plaintiff's contention that the contract in question does not express the true agreement of the parties, is well founded. We have reached the conclusion that the ruling of the Commissioner of Internal Revenue was correct. It is therefore ordered and adjudged that plaintiff's petition be dismissed.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

ATLANTIC COAST LINE RAILROAD CO. v. THE UNITED STATES

[No. E-92. Decided January 7, 1929]

On the Proofs

Statute of limitations; freight transportation; accrual of right of action.—Claim for freight transportation furnished the Government accrues upon rendition of the service, and the statute of limitations, sec. 156, Judicial Code, runs therefrom.

The Reporter's statement of the case:

Mr. M. C. Elliott for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Perry W. Howard* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation and a common carrier by railroad of freight and passengers.

II. At the time of transportation of the troops and military impedimenta hereinafter mentioned there were in force on the lines of the plaintiff and its connecting carriers furnishing the transportation certain special baggage car tariffs covering the territory through which the said troops and impedimenta were moved, which stated the terms and conditions upon which associated travelers traveling on one ticket might become entitled to a baggage car free for the transportation of certain of their effects on the basis generally of one such car to each 25 passengers.

III. During the time the said transportation services hereinafter mentioned were performed, the railroad companies of the United States generally, including the plaintiff and its connections, were parties to certain military agreements or arrangements with the Government, which authorized certain fares and allowances in connection with military transportation, commonly known as "Revised Western Military Arrangement," dated April 1, 1916, and "Interterritorial Military Arrangement No. 1," dated December 28, 1916.

The said Western Military Arrangement which was effective from July 1, 1916, to December 31, 1916, contained among other provisions the following:

"One hundred and fifty (150) pounds of personal effects of officers and men properly checkable as baggage will be transported without charge for one person, but this does not include company, battalion, regimental or Government property. Personal baggage in excess of the weight stated, when provision for transportation of same is specifically made in U. S. Army, U. S. Navy, and U. S. Marine Corps transportation requests will be charged for at the excess baggage rate less lawful land-grant deductions.

"When company, battalion, regimental or Government property is moved on passenger trains, it shall be subject to adjustment for each movement."

The said Interterritorial Military Arrangement which was effective from January 1, 1917, and throughout the year 1917,

superseded the military arrangement of April 1, 1916, and contained among other provisions the following:

"(1) One hundred and fifty (150) pounds of personal effects, properly checkable as baggage, under the tariff of the initial carrier, will be transported without charge for each person. Personal baggage in excess of the free allowance stated when provision for the transportation of excess baggage is specifically made in United States Army, Navy, or Marine Corps transportation requests and is paid for by the United States Government, will be charged for at the regular excess baggage rate, based upon the net individual fare. When provision is not made in the transportation requests for the transportation of excess baggage, collection will be made from the traveler at the regular commercial rate for weight in excess of the free allowance stated. Excess baggage charges will not be subject to allowance applicable in connection with the fares for tickets under this arrangement. Baggage regulations in other respects than above will be in accordance with the tariff of the initial carrier checking the baggage in each case.

"(2) Company battalion, regimental, or Government property is not included in the above."

IV. On October 5, 1916, at the instance and request of authorized officers of the United States Army the plaintiff, on Government bill of lading No. WQ–42, transported certain shipments of military impedimenta, wood, hay and grain, escort wagons and mules in conjunction with a troop movement of 157 men and their personal baggage from Ft. Screven, Ga., to State Camp, Yukon, near Jacksonville, Fla. The said movement of troops and property was made in accordance with an accepted proposal of the Central of Georgia Railway Company naming a per capita rate for the officers and enlisted men with 150 pounds of baggage and impedimenta per capita transported free, and that "baggage and impedimenta weighing in excess of one hundred and fifty (150) pounds per capita will be charged for at the following rate: Ft. Screven to State Camp, Fla., 85¢ per cwt. All freight shipments, live stock, wagons, etc., will be transported at the regular freight rates, subject to freight classification. Regular freight bills of lading will be issued covering all freight shipments from Ft. Screven to State Camp, Fla."

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Bill of lading No. WQ-42 was accomplished by the consignee on October 6, 1916.

On March 13, 1917, the plaintiff, as final carrier, made delivery of certain shipments of military impedimenta and troop property, horses, automobiles, automobile trucks, and escort wagons, which were transported on Government bill of lading No. WQ-564 at the instance and request of authorized officers of the United States Army in conjunction with a troop movement from Laredo, Texas, to Yukon, near Jacksonville, Fla. Bill of lading No. WQ-564 was accomplished by the consignee March 13, 1917.

V. The plaintiff was the last carrier of all of said shipments, and as such last or delivering carrier rendered on the said bills of lading Nos. WQ-42 and WQ-564 its freight bills Nos. 13594 and 13689 in the sums of $819.56 and $3,-276.20, respectively, based upon certain classifications and rates which the plaintiff claimed were applicable to said freight, and submitted the same to disbursing officers of the Army on April 9 and May 9, 1917, respectively, for payment in said amounts. The bills were restated by the disbursing officers and returned to plaintiff for signature. Plaintiff signed the restated bills and returned them to the disbursing officers with letters dated February 25, 1919, requesting that same be passed to the Auditor for the War Department for payment.

The amounts claimed on account of the said bills were wholly disallowed by the Auditor for the War Department in settlements Nos. 43527, August 14, 1919, and 42794, July 22, 1919, on the ground that the Government was entitled to the use of one car free for every twenty-five fares paid for the men in the troop movement. The plaintiff has not been paid the amount claimed for the said services or any part thereof. Petition therefor was filed in this court February 10, 1925.

VI. On the basis of freight service the charges on the said shipments, according to duly filed and published tariffs, less land-grant deductions, would be as follows: Bill No. 13594, bill of lading WQ-42, $280.00; Bill No. 13689, bill of lading WQ-564, $1,601.29, a total of $1,881.29.

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

The facts in this case are agreed, and may briefly be stated as follows:

Plaintiff, Atlantic Coast Line Railroad Company, transported on Government bills of lading dated October 5, 1916, and March 13, 1917, two consignments of military impedimenta from Fort Screven, Georgia, and Laredo, Texas, to State Camp, Yukon, near Jacksonville, Florida. The amounts claimed for said services were disallowed by the Auditor for the War Department on July 22, 1919, on the ground that the Government was entitled to the use of one baggage car free of charge for every 25 fares paid for the men accompanying the freight movement.

It is conceded by defendant that plaintiff's contention on the principal question of law involved herein has been definitely settled, and in plaintiff's favor, by the decision of this court in the case of *Missouri Pacific Railroad Co.* v. *United States*, 56 C. Cls. 341. It is seriously contended, however, that plaintiff is barred from recovery by reason of laches, and also by reason of the statute of limitations, under the provisions of section 156 of the Judicial Code.

It will be observed that the services herein were rendered in the months of October, 1916, and March, 1917. The claims were disallowed by the Auditor for the War Department in July, 1919. No further steps whatever were taken by plaintiff to secure the relief sought in this action until the petition was filed on February 10, 1925, nearly nine years after the rendition of the services, and nearly six years after the disallowance of the claims, and more than three years after the decision in the *Missouri Pacific Railroad Company case* which definitely settled the question of plaintiff's right to the relief which it now seeks. It is not necessary, however, in the opinion of the court to determine the question as to whether plaintiff should be barred from recovery on the ground of laches, for the reason that under the de-

cisions of this court plaintiff's cause of action accrued upon the rendition of the services nearly nine years prior to the institution of this suit. This principle is announced in the case of *St. Louis, Brownsville & Mexico Railway Co.* v. *United States*, 63 C. Cls. 103, which cited with approval the case of *Baltimore & Ohio Railroad Co.* v. *United States*, 52 C. Cls. 468, wherein the court said: "When the service in question had been rendered there were two courses open to the plaintiff for the assertion of its rights to compensation. One was to apply for payment through the disbursing or accounting officers of the Government, and the other was by action in this court." See also *Battelle* v. *United States*, 7 C. Cls. 297.

We are of the opinion that plaintiff's cause of action accrued upon the rendition of the services. The right of recovery, therefore, is barred by the statute of limitations. The petition will be dismissed, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

CHARLES E. KALTENBACH v. THE UNITED STATES

[No. D-584. Decided January 7, 1929]

On the Proofs

Income tax; secret process; deduction for obsolescence; exhaustion, wear and tear.—The allowance for obsolescence among the deductions provided for in section 214 (a) of the revenue act of 1921, is in connection with property that is subject to exhaustion, wear and tear, and where a secret process is not so subject deduction for its becoming obsolete is not proper.

The Reporter's statement of the case:

Messrs. Victor House and *Abbot P. Mills* for the plaintiff. *Mr. George V. A. McCloskey* was on the briefs.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Messrs. Alexander H. McCormick* and *Dan M. Jackson* were on the briefs.

The court made special findings of fact, as follows:

I. The plaintiff is a loyal citizen of the United States. He has at all times borne true allegiance to the United States and has not aided, abetted, or given encouragement to rebellion against it.

II. Prior to 1913 the plaintiff discovered and developed a process for weighting silk by the use of chemicals or metals. This was a secret process and was never patented.

III. The process was used, to some slight extent, by the firm of Kaltenbach & Stephens, in which plaintiff was employed, but no sale or license was ever made of the process prior to 1919.

IV. Between the years 1913 and 1919 the plaintiff endeavored to prove to his father, the senior partner, and later the larger stockholder, when the partnership was incorporated, and Mr. Stephens, the other partner, the value of his process. The plaintiff's father died in 1918, and Mr. Stephens shortly thereafter, without having authorized the use or purchase of the process. The plaintiff was then made president of the then corporation, and continued to urge the use of his process by the corporation. Finally, in 1919, the stockholders, all relatives of the former partnership, decided to try out the process, and after considerable discussion as to the terms which would compensate the plaintiff, if the process was successful, but would safeguard the corporation if the venture was unsuccessful, authorized the plaintiff's uncle, Henry Kaltenbach, to draw up the contract providing for the payment to the plaintiff of 25 per cent of all profits over $100,000 earned during each year for a three-year period, such contract to be renewable by the corporation at the end of the term, if it proved successful. The following is a copy of the contract:

ARTICLES OF AGREEMENT entered into this nineteenth day of August, nineteen hundred and nineteen, between Kaltenbach & Stephens, Inc., a corporation organized and existing under the laws of the State of Delaware, party of the first part, and Charles E. Kaltenbach, of Cranford, in the county of Union and State of New Jersey, party of the second part.

In view of the duties in addition to those of president which devolve upon party of the second part in the conduct and management of the business of the party of the first part, and the desire of the party of the first part to retain the services of the party of the second part for a period of years, and to secure the shop rights on any processes that may have been or that may be perfected by the party of the second part while engaged in the service of the party of the first part, it is agreed by and between the parties hereto in consideration of the premises and the payment of the sum of one dollar paid by the party of the first part to the party of the second part, the receipt whereof is hereby acknowledged and the mutual agreements and undertakings hereinafter contained, that the party of the second part shall devote his entire time to the supervision of the purchasing of raw material, the manufacture and disposition of the product of the party of the first part, and the general conduct of its affairs; and, further, that the party of the first part shall have what are known as shop rights on any and all processes which the party of the second part has developed or perfected or may develop or perfect while in the service of the party of the first part which can be used in connection with the business and manufacturing operations of the party of the first part, such processes, however, to be the property of and belong to the party of the second part. And that for the services thus rendered and shop rights thus bestowed, the party of the first part pay to the party of the second part in addition to the salary he now receives as president, 25% of the annual net profits of the party of the first part in excess of one hundred thousand dollars; payment to be made annually after the profits have been ascertained, either in cash or preferred stock of Kaltenbach & Stephens, Inc., as the party of the first part may elect, provided that sufficient be paid the party of the second part in cash to enable him to pay Federal and State income tax on the amount to which he may be entitled under this agreement.

In determining the profits of the party of the first part, it is understood that the present general method of determining the profits shall be continued, with the exception

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that hereafter at the end of each year the basis of valuation of the inventories shall first be determined upon by the board of directors—that is, as to whether the inventory shall be taken at cost or market, and, for the purpose of determining the amount due to the party of the second part, the net profits shall be taken as then shown by the books before the deduction of any Federal taxes which may be assessed against the party of the first part under the Federal statutes at the time of any adjustment made between the parties hereto.

The period of this agreement shall be for three years beginning on January 1st, 1919, and terminating on December 31st, 1921, provided that at least six (6) calendar months' notice in writing of the termination of this agreement on December 31st, 1921, has been given by either party to this agreement to the other, on behalf of the party of the first part by the action of its board of directors and the service of such notice upon the party of the second part personally or by mail, and by the party of the second part by the services of such notice on a principal officer of the party of the first part in Newark, New Jersey; otherwise this agreement shall continue until its abrogation by mutual consent or six calendar months' notice in writing by one party to the other in the manner above set forth.

In witness whereof the party of the first part has caused its corporate seal to be hereunto affixed and these presents to be executed on its behalf by its officers duly authorized by its board of directors, and the party of the second part has hereunto set his hand and seal the day and year first above written.

KALTENBACH & STEPHENS, INC.,
By JOHN C. EISELE,
Vice President.
CHARLES E. KALTENBACH.

Attest:
H. J. KALTENBACH,
Secretary.
Signed, sealed, and delivered in the presence of:
THOMAS M. SCHEIDLER.

The above contract expressed the true agreement entered into between the parties thereto. The plaintiff's uncle, Henry Kaltenbach, who drew said contract, was a man of wide business experience and was familiar with contract forms. When he signed the contract, plaintiff was about 34 years of age and a man of unusual intelligence.

V. In 1919, at the time the contract was made, the plaintiff had the intention of acquiring all the stock of said corporation within the next three or four years.

VI. During the three-year period of the contract, 1919–1921, inclusive, the plaintiff installed and used his process to a great extent and received as his payment for using the same under the contract the sum of approximately $530,000 over and above his salary. The contract provided for an extension at the end of the three-year period, and it was the expectation of the plaintiff that such extension would be made by the corporation owing to the profits made on account of it. However, in 1921, a process known as the Swiss Phosphate Foam process was brought to the attention of the plaintiff and its economies over his own process were demonstrated to such an extent that he installed it in the plant of the corporation as a substitute for his own more expensive process. In this way plaintiff's process became obsolete. As a result of this installation of the Swiss process at the end of the three-year period provided in the contract, the plaintiff's process no longer was necessary and the corporation decided not to renew the contract for the use of the plaintiff's process and made a settlement with him for the cancellation of the contract and the payment to him of $10,000.

VII. The plaintiff had constantly the fear before him that the secret of his formula would escape, and for this reason never divulged it to the other officials of the corporation.

VIII. After the contract was drawn up, read, and signed by the parties thereto, the formula for the process was written out, placed in a sealed envelope, and kept hidden either in the safe or in the desk of the plaintiff's office, in the plant of the corporation, with directions written thereon by plaintiff to be opened in the event of his death. The plaintiff stated that he was very much afraid in making a sale to the corporation of his process that the secret would escape.

IX. Plaintiff's process, as of March 1, 1913, had a fair market value of at least $1,000,000.

X. On or about March 15, 1922, plaintiff filed his original tax return for the year 1921, wherein there was included

as income the sum of $57,500, representing approximately 10% of the corporation's profits for the year 1921. Upon this return a tax of $22,872.24 was duly paid by the plaintiff.

XI. On or about July 31, 1923, plaintiff filed an amended return herein, reporting in and as income the sum of $27,807.40, instead of the $57,500 above mentioned, to represent 5% of the profits of the corporation for 1921 after deduction of Federal taxes, and deducting from income the sum of at least $250,000 to represent obsolescence sustained in the year 1921 by plaintiff by reason of the replacement of plaintiff's process by the so-called "foam-phosphate" process above mentioned. Said amended return showed no tax due or payable by plaintiff for the year 1921.

XII. Contemporaneously with filing said amended return and within four years from the time the tax shown by the original return was paid, the plaintiff duly filed with the Commissioner of Internal Revenue a claim in writing for the refund of $22,872.24, being the amount of tax paid under the original return.

XIII. More than six months had at the time of the commencement of this suit elapsed since the making and filing of said claim for refund, and the Commissioner of Internal Revenue has failed and refused to approve the said claim. Less than five years have elapsed between the date of payment of the tax mentioned and the date of the beginning of this suit.

XIV. The said sum of $22,872.24, with interest, which the plaintiff is herein seeking to recover has not been paid to the plaintiff or to anyone for or on his account, nor has any part thereof been paid.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

This is a tax case and relates to the year 1921. It is the companion case of *Charles E. Kaltenbach* v. *United States*, No. D–583, relating to the year 1919. Both cases involve the same contract, set forth in Finding IV. In case No. D–583, decided by this court on this date, against the contention of

plaintiff it was held that said contract was a license for the use of plaintiff's process and not a sale.

In the present case, No. D-584, in the event that the court does not sustain plaintiff's contention with respect to the sale of his process, plaintiff presents an alternative claim for the refund of the taxes paid, because of the obsolescence of his process in the year 1921. Plaintiff cites as applicable the deductions allowed in section 214 (a) (8) of the revenue act of 1921 (42 Stat. 240):

"(8) A reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913."

It is the contention of defendant that the secret process of plaintiff for the tin weighting of silk is not susceptible to exhaustion, wear, and tear, or obsolescence, within the purview of (8), *supra*. We think defendant's contention is well taken. Language identical with (8), in the revenue act of 1918, was construed in a well-considered opinion by the Circuit Court of Appeals, Eighth Circuit, in *Red Wing Malting Co.* v. *Willcuts* (15 Fed. (2d) 626, 631), wherein the court said:

"It seems to us that the language 'including a reasonable allowance for obsolescence' is but a part of and an enlargement of the previous phrase of the said subsection (7) relating to exhaustion, wear, and tear, and that the first part of the sentence was intended to cover the subject matter thereof. It does not add a new kind of deduction, but merely permits the inclusion of an additional element, namely, obsolescence of such property used in the business as is subject to exhaustion, wear, and tear. The allowance for obsolescence was intended to be in connection with the allowance for exhaustion, wear, and tear; that being at times insufficient to restore the proper basis of capital values."

According to the ruling in the *Red Wing case*, *supra*, it is evident that a secret process for the weighting of silk by the use of chemicals or metals can not be subject to exhaustion, wear, and tear, and therefore is not subject to obsolescence, within the purview of (8). In *Red Wing Malting*

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Co. v. *Willcuts*, *supra*, certiorari was denied by the Supreme Court (273 U. S. 763).

It is further contended in plaintiff's brief that section 214 (a) (4) of the revenue act of 1921 (42 Stat. 240) is applicable to his case:

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business."

It is questionable whether the language of (4) is before us for construction. It does not appear that plaintiff predicated his claim for refund before the Commissioner of Internal Revenue on (4). On the contrary, it appears in Finding XI, which was one of the findings of the commissioner of this court, and which was not objected to by plaintiff, that plaintiff's claim for refund, aside from the claim of sale, was predicated solely on obsolescence, under (8). This identical point was commented upon by the court in *Red Wing Malting Co.* v. *Willcuts*, *supra*, where the court said:

"It does not appear from the record that any claim under subsection (4) for refund covering the loss of good will as a sustained loss during the taxable year was presented to the Commissioner of Internal Revenue prior to bringing this action and a refund requested. The application for refund does not appear in the record. Such application is a condition precedent to the jurisdiction of this court in matters of this character. The precise ground upon which the refund is demanded must be stated in the application to the commissioner, and we think, if that is not done, a party can not base a recovery in the court upon an entirely different and distinct ground from that presented to the commissioner."

However this may be, we do not think that (4) is applicable in this case. It does not appear that plaintiff suffered actual loss, within the purview of (4), when his secret process was superseded by the Swiss process referred to in Finding VI. Plaintiff's process was discovered and developed by himself. Its cost to him was problematical. It does not appear in the record. If the language of (4) were properly before us for construction we would feel compelled to hold, under the authority of *United States* v. *Flannery* (268 U. S. 98, 105), that plaintiff sustained no actual loss, within the purview of (4).

We have reached the conclusion that the Commissioner of Internal Revenue was correct in denying plaintiff's claim for refund. It is therefore ordered and adjudged that plaintiff's petition be dismissed.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

CLINCHFIELD NAVIGATION CO. v. THE UNITED STATES

[No. F-119. Decided January 7, 1929]

On the Proofs

Income tax; return for calendar year; consolidated excess-profits tax return of parent company for fiscal year.—A corporation which had theretofore used the calendar year as its accounting period and made its income-tax returns accordingly was not under the law required to change its income-tax return to the fiscal year used by the parent company in making a consolidated excess-profits tax return, viz, ending June 30, 1917, and having properly made a return of its income for the calendar year ending December 31, 1917, was entitled to assessment upon that basis.

The Reporter's statement of the case:

Mr. Edward C. Bailly for the plaintiff.

Messrs. A. K. Morison and *H. H. Shelton* were on the briefs.

Mr. Alexander H. McCormick, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized and existing under the laws of the State of New York, engaged in the business of shipowners, operators, and brokers, and at all times material to this suit had its principal place of business, where its books of account were kept, at No. 24 Broad Street, in the city and State of New York. The majority of its stock is, and was, at the times herein mentioned, owned

and controlled by the Clinchfield Coal Corporation, a corporation of the State of Virginia.

II. The plaintiff adopted the calendar year as its annual accounting period or year, and its books of account were kept on that basis from the time of its incorporation to and including December 31, 1917.

III. All Federal income-tax returns made by plaintiff for the period from the date of its incorporation to and including December 31, 1917, were made on the basis of the calendar year, were filed with the collector of internal revenue of the second district of New York at the customhouse, New York City, and the taxes shown to be due by said returns were paid to said collector of internal revenue.

IV. Plaintiff made only one Federal income-tax return for each of the calendar years 1915, 1916, and 1917, and no additional or supplemental income-tax returns were made or filed by it for any of said years.

V. The plaintiff filed its Federal income-tax return for the calendar year ending December 31, 1917, on or about April 23, 1918, showing therein a net income for that year of $505,626.91, and on April 23, 1918, paid to the collector of internal revenue of the second district of New York the income tax due thereon of $30,337.62.

VI. The Clinchfield Coal Corporation, aforesaid, parent company of the plaintiff herein, filed with the proper collector of internal revenue for the State of Virginia on or about April 23, 1918, for itself and plaintiff a consolidated excess-profits tax return for the six months' period ending June 30, 1917. The tax as shown to be due was $103,708.86 and was paid to the collector of internal revenue for the district in which the Clinchfield Coal Corporation resided in Virginia by check of Blair & Company, bankers for the plaintiff and the Clinchfield Coal Corporation. The assessment list of the collector for the sixth Virginia district shows that the excess-profits tax was assessed against the Clinchfield Coal Corporation. There is no proof that the said tax was ever included in the Clinchfield Coal Corporation's tax returns as a deduction or that the Commissioner of Internal Revenue in his assessment of taxes allowed it as

a deduction to the credit of the said corporation. Blair & Company charged the account of the Clinchfield Coal Corporation with this amount and the Clinchfield Coal Corporation was reimbursed by the plaintiff for the reason that the excess-profits tax was in a large way made necessary for this group by the earnings of the plaintiff corporation. In its income-tax return for the year ending December 31, 1917, the plaintiff deducted the total amount of the tax paid as above described. The Clinchfield Coal Corporation kept its accounts on the basis of a fiscal year ending June 30, and on that basis made its Federal income and excess-profits tax returns.

VII. After the plaintiff had filed its income-tax return for the calendar year 1917 and paid the tax thereon of $30,337.62, the commissioner determined to require plaintiff to make its returns and pay its taxes on a fiscal-year basis ending June 30. Accordingly he computed the plaintiff's net earnings for the period January 1 to June 30, 1917, at $1,306,352.17 and, from the tax on such earnings, deducted one-half of tax already assessed and collected ($15,168.81) on the calendar-year basis.

In accordance with this computation the commissioner assessed against the plaintiff additional taxes on or about March 22, 1923, in the sum of $63,212.32, to which he thereafter added interest amounting to $7,585.49, making a total additional assessment of $70,797.81. Included in the additional assessment was a group of items not returned as income by the plaintiff in its income-tax return for the year ending December 31, 1917. These items were income to the plaintiff for the year 1917 and totaled $24,400.71.

VIII. On May 13, 1925, plaintiff received notice and demand, dated May 12, 1925, for the payment of said additional taxes and interest assessed against it for the six months' period January 1 to June 30, 1917, to the Treasury Department of the United States, namely, $63,212.32, as additional income tax, and $7,585.41, as interest thereon, the total amount demanded being $70,797.81. Plaintiff thereupon on May 20, 1925, under the threat of distraint and sale contained in said notice, paid the additional tax under protest, and no refund thereof has been made.

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IX. On May 20, 1925, plaintiff filed with the Commissioner of Internal Revenue, in the form prescribed by law, its claim for refund of the said additional taxes and interest, amounting to $70,797.81, so assessed against and collected from it for the period January 1 to June 30, 1917; and the Commissioner of Internal Revenue had rendered no decision thereon at the time of the filing by plaintiff of its petition in this court for the recovery of said amount.

X. The only assessment on plaintiff of additional income taxes for any portion of the year 1917 was that for the period January 1 to June 30, 1917, made by the Commissioner of Internal Revenue on or about March 22, 1923, which resulted in the collection of the additional taxes and interest aggregating $70,797.81, which is the subject of this suit. No assessment of additional income tax upon the plaintiff for the calendar year 1917 as distinguished from the period January 1 to June 30, 1917, was ever made.

XI. If plaintiff be entitled to a deduction in its income-tax return for the calendar year 1917 of $103,708.86 excess-profits tax, Finding VI, and there should be included in its taxable income for that year the sum of $24,400.71, Finding VII, the amount of recovery, if any, on the calendar year basis would be $69,158.10 principal.

The court decided that plaintiff was entitled to recover $69,158.10 with interest from May 20, 1925, to such date as the Commissioner of Internal Revenue might determine, in accordance with subsection (b), sec. 177, Judicial Code (revenue act, May 29, 1928).

MOSS, *Judge*, delivered the opinion of the court:

The plaintiff, Clinchfield Navigation Company, a New York corporation, adopted the calendar year as its annual accounting period, and its books of account were kept on that basis from the time of its incorporation, February 20, 1915, until December 31, 1917. During all this period its income-tax returns were made on the calendar-year basis. On April 23, 1918, plaintiff filed its income-tax return for the calendar year ending December 31, 1917, and paid the amount of tax shown to be due thereon, $30,337.62. Plaintiff was a subsidiary of the Clinchfield Coal Corporation,

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a Virginia corporation, which kept its books of account and made its tax returns on the basis of a fiscal year ending June 30. On April 24, 1918, the Clinchfield Coal Corporation, under the requirements of the revenue act of 1917, filed in the proper tax district of Virginia a consolidated *excess-profits* tax return for itself and affiliated companies, including plaintiff company, for the period January 1 to June 30, 1917. In March, 1923, there was assessed against plaintiff company an additional income tax for the year 1917, amounting to $63,212.32, based on net income of $1,312,442.83 received by plaintiff for the six months' period ending June 30, 1917. In May, 1925, plaintiff paid under protest the amount of the additional assessment, with interest, in the total sum of $70,797.81. This action is for the recovery of said sum.

It is contended by plaintiff, first, that the Commissioner of Internal Revenue was without authority to change plaintiff's taxable period from the calendar year ending December 31, 1917, to the fiscal year ending June 30, 1917, and, second, that the collection of said additional tax more than five years after the date of the return, was in violation of 250 (d) of the revenue act of 1921 providing that no suit or proceeding for the collection of such taxes should be begun after the expiration of five years after the date when the return was filed.

Section 10 and section 13 (a) of the revenue act of 1916 as amended by the act of 1917, 39 Stat. 1000, read as follows:

"SEC. 10. There shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation * * * a tax of two per centum upon such income."

"SEC. 13 (a). The tax shall be computed upon the net income as thus ascertained, received within each preceding calendar year ending December thirty-first."

The only exception to the foregoing provisions is contained in the following additional paragraph to section 13 (a):

"*Provided*, That any corporation * * * subject to this tax, may designate the last day of any month in the

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year as the day of the closing of its fiscal year and shall be entitled to have the tax payable by it computed upon the basis of the net income ascertained as herein provided for the year ending on the day so designated in the year preceding the date of assessment instead of upon the basis of the net income for the calendar year preceding the date of assessment; and it shall give notice of the day it has thus designated as the closing of its fiscal year to the collector of the district in which its principal business office is located at any time not less than thirty days prior to the first day of March of the year in which its return would be filed if made upon the basis of the calendar year."

The Internal Revenue Bureau promulgated certain regulations interpreting said act. In article 59, Regulation 33, taxable year, or taxable period, is defined as "the calendar year, or duly established fiscal year." Article 5, Regulation 41, contains the following language:

"The term 'taxable year' means the twelve months ending December 31 of each year, except in the case of a corporation or partnership which has fixed its own fiscal year, in which case it means such fiscal year."

In article 25, Regulation 45, it is provided:

"The return of a taxpayer is made and his income computed for his taxable year, which means his fiscal year, or the calendar year if he has not established a fiscal year * * *. A person having no such fiscal year must make return on the basis of the calendar year."

It clearly appears, therefore, that the purpose of the act in question was to require the computation of the tax to be based on the calendar year unless the taxpayer had established a fiscal-year basis in pursuance of the authority under the statute so to do. The latter provision was manifestly intended for the convenience of the taxpayer in conducting the affairs of his business and in keeping his books of account. Plaintiff during the whole period of its existence had kept its books of accounts and had made its income-tax returns on the calendar-year basis, and it seems clear to the court that under the law and the regulations its right to do so could not be affected by the requirement of a consolidated return by the parent company for *excess-profits* tax.

Opinion of the Court

The excess-profits tax was a war emergency measure, enacted in 1917, 40 Stat. 303, and was a tax "in addition to the taxes under existing law * * *." The Clinchfield Coal Corporation was required under this act to file a consolidated return for excess-profits tax purposes. It did not file a consolidated return for income tax purposes, and the Commissioner of Internal Revenue neither required nor suggested such a return for that year, nor for the period covered by the return for excess-profits tax, January 1 to June 30, 1917. In a letter from the Deputy Commissioner of Internal Revenue dated November 8, 1920, the parent company was advised that—

"For subsequent taxable years it will be necessary for the subsidiary company to change its accounting period to correspond with that of the parent or principal company, in order that consolidated net income and invested capital may be accurately determined."

This letter contained other instructions not necessary to mention here and advised that "A copy of this letter should be attached to each of your returns when filed." These instructions, as plainly appears, were intended to serve as a guide for the future conduct of the parent company and its subsidiaries in regard to filing tax returns. There was no suggestion that the existing plan was improper or illegal. It was an instruction based on the recognition of the necessity for making a change, for reasons set forth in the letter. At that time the Commissioner of Internal Revenue evidently had no thought of attempting to disturb plaintiff's status with reference to its income-tax liability for a taxable period three years prior to the date of said instructions. It was not until March, 1923, that the additional assessment was made, based wholly on the change by the commissioner of plaintiff's taxable period, from the calendar year ending December 31, 1917, to the fiscal year ending June 30, 1917.

The fundamental theory of the tax statute under consideration is to provide for a tax upon the net income of the taxpayer for the period of one year, computed in accordance with the method of accounting regularly employed by

the taxpayer in keeping his books. The Government will derive by either method the full amount of revenue to which it is entitled. No advantage whatever will be gained by the Government from the establishment of one method rather than the other. On the other hand, the change of taxable period in 1923, in this case, to relate back to the tax return of 1917, has resulted in the Government receiving more revenue than it was entitled to collect, for the reason that in the particular period from January 1 to June 30, 1917, plaintiff actually received much the greater part of its income for the entire year. It should be mentioned that on December 31, 1917, plaintiff adopted the fiscal year ending June 30 as its taxable period. It is the opinion of the court that the commissioner was without authority to determine the net income of plaintiff for any other taxable period than the entire calendar year 1917, and that the plaintiff is entitled to recover, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

PONCE & GUAYAMA RAILROAD CO. v. THE UNITED STATES

[No. H-71. Decided January 7, 1929]

On the Proofs

Income tax; domestic corporation doing business in Porto Rico; collection of tax.—A corporation organized in the United States, doing business in Porto Rico, having properly paid its 2 per cent income tax for the year 1917, imposed by sec. 10, revenue act of 1916, to the treasurer of Porto Rico, was under no obligation to pay the same tax to the Government of the United States (sec. 23, *ib.*). The 4 per cent additional tax imposed by sec. 4, war revenue act of 1917, was payable by the corporation to the United States Government, section 5 of the war revenue act of 1917 merely abolishing the provisions of section 23 of the revenue act of 1916 with respect to administration of the law, the collection of taxes, and payment of same into the Porto Rican treasury.

The Reporter's statement of the case:

Mr. Merill G. Hastings for the plaintiff. *Covington, Burling & Rublee* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized under the laws of the State of New Jersey and was such during the years 1917 and 1918.

II. During the years 1917 and 1918 the plaintiff Ponce & Guayama Railroad Company operated a railroad in Porto Rico which started on the eastern end at the town of Guayama and ran to the Jacaguas River, about forty miles of main line. It owned the locomotives, cars, and other rolling stock necessary to operate this line, and employed conductors, engineers, firemen, etc. The general office of the company was located at Aguirre, on the southern coast of Porto Rico, in the municipality of Salinas. The plaintiff company had its shops as well as its office at Aguirre. Its books of account and other data from which its 1917 income-tax return was prepared were kept in that office during 1917 and up to and including the dates that the return and amended return hereinafter described were made.

III. The plaintiff maintained a principal office in New Jersey as required by the laws of that State, and the New Jersey Registration & Trust Company acted as plaintiff's resident agent.

IV. The plaintiff filed an income-tax return for the calendar year 1917 in March, 1918, at San Juan, Porto Rico, and in May, 1918, filed at the same place an amended income-tax return. The plaintiff's net income for the year 1917 was $67,117.84, and it paid to the treasurer of Porto Rico a 2% income tax thereon amounting to $1,342.36, which sum is retained by the government of Porto Rico.

V. On or about April 30, 1918, the plaintiff company filed under protest with the collector of internal revenue at Baltimore, Maryland, an excess-profits tax return showing excess-

profits taxes of $7,564.18, and paid this sum as excess-profits taxes to the collector at Baltimore.

VI. The plaintiff company on or about February 14, 1921, which was within five years from the time its return for the taxable year 1917 was due, filed with the Commissioner of Internal Revenue an unlimited waiver of its right to have the taxes due for such taxable year determined and assessed within five years after the return was filed.

VII. During the year 1917 all the capital stock of the plaintiff company was owned by Central Aguirre Sugar Companies, a Massachusetts voluntary association, and the Bureau of Internal Revenue determined after audit that the excess-profits taxes on the consolidated income of the entire affiliated group, consisting of the parent, Central Aguirre Sugar Companies, and its subsidiary companies, including the plaintiff company, should be assessed against and paid by Central Aguirre Sugar Companies, thereby relieving the plaintiff company from any individual excess-profits tax liability on its separate income. The bureau set forth the results of its audit of the income and excess-profits tax liability of the members of the affiliated group in a letter dated May 19, 1924, to the parent, Central Aguirre Sugar Companies, Schedule 21 thereof setting forth the tax liability of the plaintiff company as follows:

CENTRAL AGUIRRE SUGAR CO.
PONCE & GUAYAMA RAILROAD CO.

SCHEDULE 21

Computation of tax, 1917—Total tax

	Income	Tax
Taxable net income, schedule 8	$67, 117. 84	
Taxable at 2%	67, 117. 84	$1, 342. 36
Taxable at 4%	67, 117. 84	2, 684. 72
Total tax liability		4, 027. 08
Previously assessed #16752168		7, 564. 18
Overassessment		3, 537. 10

The taxpayer claims in a brief submitted that a 2% tax amounting to $1,361.85 has already been paid to the government of Porto Rico, but this office has not sufficient evidence to support claim. However, a claim for refund should be entertained upon submission of satisfactory evidence in accordance with section 23 of the revenue act of September 8, 1916.

Reporter's Statement of the Case

VIII. On September 16, 1924, the collector of internal revenue of Baltimore, Maryland, refunded to the plaintiff company that part of the $7,564.18 excess-profits tax payment, namely, $3,537.10, which the bureau in its letter of May 19, 1924, had determined to be in excess of the total tax liability of the plaintiff company.

IX. On or about October 21, 1924, the plaintiff company filed with the collector of internal revenue at Baltimore (1) a claim for refund of that part of its excess-profits tax payment of $7,564.18 which had been retained to apply against the plaintiff's alleged 2 per cent income-tax liability, namely, $1,342.36, accompanied by official evidence that the plaintiff had already paid this 2 per cent income tax of $1,342.36 to the treasurer of the island of Porto Rico, and (2) a further claim for refund of that part of its excess-profits tax payment of $7,564.18 which had been retained to apply against the plaintiff's alleged 4 per cent income-tax liability, namely, $2,684.72, in which it was claimed that the plaintiff was not subject to this 4 per cent income tax.

X. On February 19, 1925, the Commissioner of Internal Revenue allowed the plaintiff's claim for refund of that portion of the sum of $7,564.18 which had been retained to apply against the plaintiff's 2% income-tax liability, amounting to $1,342.36, on the ground that the plaintiff had paid this tax to the government of Porto Rico, and was, therefore, not required to pay same to the United States. At the same time the commissioner rejected the plaintiff's claim for a refund of the 4% income tax in the sum of $2,684.72.

XI. Thereafter there was refunded on May 11, 1925, to the plaintiff company the amount withheld to apply against the alleged 2 per cent income-tax liability, namely, $1,342.36, together with interest thereon in the amount of $495.92, but no refund has been made of the amount withheld to apply against the alleged 4 per cent income-tax liability, namely, $2,684.72, or any part thereof.

The court decided that plaintiff was not entitled to recover. Counterclaim dismissed.

Opinion of the Court

MOSS, *Judge*, delivered the opinion of the court:

Plaintiff, Ponce & Guayama Railroad Company, a corporation organized under and by virtue of the laws of the State of New Jersey, operated a railroad in Porto Rico during the years 1917 and 1918. In March, 1918, plaintiff filed with the treasurer of the island of Porto Rico an income-tax return for the year 1917, and paid to said treasurer an income tax of 2% on the income shown in the return to wit: $1,342.36. Thereafter, plaintiff was required to pay to the Government of the United States for the same year an equal tax of $1,342.36, being 2% on its net income. It was further required to pay to the Government of the United States a 4% tax on said income, amounting to $2,684.72. The transactions involving these payments are fully set forth in the findings herein. Plaintiff filed claim for the refund of each of said sums. The claim for $1,342.36 was allowed, and the claim for $2,684.72 was rejected. This action is for the recovery of that sum. In allowing the refund of the first claim the Commissioner of Internal Revenue adopted the contention of plaintiff, that having paid said tax to the treasurer of Porto Rico it was under no obligation to pay same to the Government of the United States. On this point defendant is now contending that the action of the commissioner in respect thereto was erroneous and illegal, and is asserting a counterclaim for the recovery of same.

The question to be determined is whether or not plaintiff corporation, organized and existing under the laws of New Jersey, and operating a railroad in the island of Porto Rico, is required under the applicable statutes to pay to the Government of the United States income taxes of 2% and 4% on its net income for the year 1917.

The 2% tax is provided for by the revenue act of 1916, 39 Stat. 756, the pertinent portions of which are as follows:

"SECTION 10. That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company, or association, * * * organized in the United States, no matter how created or

organized, * * * a tax of two per centum upon such income * * *."

The 1916 act was expressly extended to Porto Rico by section 23 of the act, which reads as follows:

"That the provisions of this title shall extend to Porto Rico and the Philippine Islands: *Provided*, That the administration of *the law* and collection of *the taxes imposed* in Porto Rico and the Philippine Islands shall be by the appropriate internal revenue officers of those governments, and all revenues collected in Porto Rico and the Philippine Islands *thereunder* shall accrue intact to the general Governments thereof, respectively: * * *." (Our italics.)

In strict conformity with the provisions of this section plaintiff made its return of the 2% tax to the appropriate internal-revenue officers of the government of Porto Rico, and paid its tax to the treasurer of Porto Rico. By section 23, the general provisions of the act of 1916 were extended to Porto Rico, but the administration of *the law* and the collection of *the taxes* were explicitly lodged in the officials of the government of Porto Rico; and the revenue thus produced *accrued* intact to the government of Porto Rico, and was paid to that government. By this payment plaintiff discharged its full tax liability under the act of 1916, and the action of the Commissioner of Internal Revenue in refunding this tax was correct.

The 4% tax is controlled by section 4 of the revenue act of 1917, 40 Stat. 300, the applicable portions of which are as follows:

"That in addition to the tax imposed by subdivision (a) of section 10 of such act of September eighth, nineteen hundred and sixteen, as amended by this act, there shall be levied, assessed, collected, and paid a like tax of four per centum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, by every corporation * * * subject to the tax imposed by that subdivision of that section. * * *."

Plaintiff contends that it is not liable for the 4% tax, because of the provisions of section 5 of the 1917 act, which reads as follows:

"That the provisions of this title shall not extend to Porto Rico or the Philippine Islands, and the Porto Rican or

Philippine Legislature shall have power by due enactment to amend, alter, modify, or repeal the income-tax laws in force in Porto Rico or the Philippine Islands, respectively."

We are unable to agree with that contention. While its business was located, and its income produced, entirely in Porto Rico, plaintiff was a New Jersey corporation. In order to determine the class of corporations subject to the 1917 4% tax, it is necessary to refer to said subdivision (a) of section 10 of the act of 1916 which provides:

"That there shall be levied, assessed, collected, and paid annually upon the *total net income* received in the preceding calendar year *from all sources by every corporation*, joint-stock company or association, or insurance company, *organized in the United States, no matter how created or organized*, but not including partnerships, a tax of two per centum upon such income; * * *.

"The foregoing tax rate shall apply to the *total net income* received by every taxable corporation, joint-stock company or association, or insurance company in the calendar year 1916 and in each year thereafter * * *." (Italics ours.)

Plaintiff corporation clearly falls within the meaning of the provisions just quoted, and is subject to the 4% tax, unless it is exempt therefrom under the provisions of section 5 above set forth. It will be observed that both the 2% tax and the 4% tax were imposed upon the *total net income received from all sources by every corporation organized in the United States*. But as hereinabove pointed out, the act of 1916 explicitly provided the manner of payment, and the disposition of the revenue produced by said 2% tax. To the extent that this tax provided revenue for the expenses of the administration of the government of Porto Rico, the Government of the United States was benefited. By that simple method the Government of the United States was saved the useless task of collecting the tax, and in turn appropriating same, or an equal sum, to the maintenance of the Porto Rican government. An entirely different situation is presented with respect to the 1917 act. At the time of its enactment the United States was at war with Germany, and the announced purpose of the act was to increase the revenue to meet the increased expenses growing out of the war. We

Syllabus

do not believe that Congress intended to exempt from taxation a New Jersey corporation deriving taxable income from business conducted in Porto Rico. We are of the opinion that in the enactment of section 5 Congress merely intended to abolish the provisions of section 23 of the 1916 act with respect to the administration of that law, and the collection of the taxes and the payment of same into the treasury of the Porto Rican government. In lieu of such provision Congress empowered the Porto Rican Legislature to construct its own income-tax scheme, which authority was actually exercised by that government in 1919. By reason of the provisions of section 23 of the 1916 act authorizing the administration of that act by the Porto Rican authorities, the act became in effect the local revenue law for Porto Rico. However, section 5 of the 1917 act authorized and empowered the Porto Rican Legislature to set up its own income-tax scheme; but in prescribing that "The provisions of this title shall not extend to Porto Rico * * *," Congress manifestly had reference only to corporations organized in Porto Rico, with which the Porto Rican Legislature was empowered to deal in constructing its own income-tax laws, and did not intend to exempt from the operations of the 1917 act United States corporations deriving income from business conducted in Porto Rico. The construction of the act contended for by plaintiff would effectually defeat its announced purpose. The action of the commissioner in rejecting the claim for the refund of this tax was correct. Both the petition and the counterclaim will be dismissed, and it is so adjudged and ordered.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAM M. ABBOTT v. THE UNITED STATES

[No. F-167. Decided January 7, 1929]

On the Proofs

Taxes; social club; membership dues.—See *Fisler* v. *United States*, *ante*, p. 220.

The Reporter's statement of the case:

Messrs. John F. McCarron and *George E. Hamilton* for the plaintiff.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a loyal citizen of the United States, a resident of the State of California, and has been since 1906 a regular member, and at one time president of the Bohemian Club of San Francisco, California, a corporation organized in 1872 under the laws of California.

II. Plaintiff, as such member, has paid to the club, during the period from March 7, 1923, to October 8, 1925, $32.00 as taxes on dues, which sum was paid by the club to the collector of internal revenue at San Francisco, California.

III. On November 27, 1925, plaintiff filed with said collector a claim for refund of said sum of $32.00. The commissioner refused to allow the claim upon the ground that "the social features of the club form a material purpose of the organization" and that it qualifies as a social club within the meaning of section 801 of the revenue acts of 1918 and 1921 and section 501 of the revenue act of 1924.

IV. The articles of incorporation of the club state that "it is designed to be, and is, a moral, beneficial association, and that its objects are the promotion of social and intellectual intercourse between journalists and other writers, artists, actors, and musicians (professional and amateur) and others associated by reason of knowledge and appreciation of polite literature, science, and the fine arts; and also the collection and preservation of records, memento, and archives illustrating the progress of literature, science, and art on the Pacific coast, and calculated to perpetuate the memory of those who have been, or shall be, instrumental in promoting such progress." The constitution subsequently adopted states its objects to be for the association of gentlemen connected professionally with literature, art, music, the drama,

and also those who by reason of their love or appreciation of these objects may be deemed eligible.

V. The membership of the club is divided into regular, associate, temporary, and transient. The regular membership covers the honorary life, life, and a list of fifty, and all other regular members. The associate covers twenty per cent of the established regular membership, who are chosen with especial reference to their talents and abilities, and who, it may be, are unable to meet the demand of dues and initiation. Temporary and transient memberships are composed of Army and Navy members and faculties of universities. In the regular membership there is a so-called professional list, which is a division of the honorary life, life, or list of fifty. The list of fifty is composed of men who have rendered outstanding service to the club along the lines of its formation. The professional membership is composed of members who earn their living in no other way than the profession of the arts, as shown by plaintiff's by-laws.

Artistic ability, while insuring preferential election, is not a prerequisite to the election of a regular member. The initiation fee of the club is $500 and the dues are $10 per month.

The totals of the various classes of memberships for 1923, 1924, 1925, and 1926 are as follows:

	Year ending Sept. 30, 1923	Year ending Sept. 30, 1924	Year ending Sept. 30, 1925	Year ending Sept. 30, 1926
Regular members	----------	----------	----------	----------
List of fifty	40	38	39	39
War list	2	1	----------	----------
Nonresident members	330	329	334	339
Transient members	126	124	127	126
Life members	25	24	25	24
Life members—honorary	20	18	18	14
Honorary	25	27	27	26
Associate	184	185	180	188
Regular members—professional	47	61	67	70
Regular members—nonprofessional	800	800	792	792
Associate members—honorary	----------	20	22	24
Junior nonprofessional regular members	----------	----------	57	89
Absentee members	----------	----------	----------	9
Total membership	1,599	1,627	1,688	1,740

VI. The club building is located at the corner of Post and Taylor Streets in the city of San Francisco. It has a frontage of ninety-seven feet on Taylor Street by a depth of

approximately one hundred and sixty-two feet on Post Street. In the basement story of the building is located the dining room, which seats approximately three hundred and fifty persons. Back of the dining room are located the kitchens, storerooms, checking rooms, and a barber shop. On the main floor of the building is located the green room, which is the general lounging room with papers and periodicals on the tables. The walls are covered with examples of painting by artist members of the club and a few well-known artist paintings purchased by the club. On the same floor is the card room or mah-jongg room, where a few tables are provided for playing cards and mah-jongg. There are no pool or billiard tables in the club. In former years the club had a billiard room. The cartoon room is also located on the same floor and its walls are covered with cartoons of the events in the life of the club and personalities of interest to the membership. It also contains a bar, which served as such prior to prohibition, at an average profit of $1,000 a month. A part of the bar has been cut away for a candy and cigar display stand; also two malted-milk shaking devices. Here is served ginger ale, White Rock, and other nonalcoholic beverages. Here also is an electric stove, sideboard, and counter, where sandwiches are served; a piano and a musical collection of scores of various operas is contained herein.

The red room is on this floor, and its walls are covered with cartoons commemorative of the high jinks or other occasions of the Bohemian Club and is sometimes used in which to serve a small dinner; it is also provided with tables, chairs, and a piano.

The owl room is adjacent to the red room and is used to serve therein an occasional small dinner. The second floor of the club is occupied mostly by the jinks room, which is used for theatrical productions, symphony-orchestra concerts, art exhibits, and general gatherings, and sometimes dinners of the club are served in it. It also contains a pneumatic organ, and the musical instruments of the club's band and symphony orchestra are kept there. On the same floor is the library room, which contains a library of approximately 11,000 volumes.

Reporter's Statement of the Case

On the second and third floors of the club are forty bedrooms, some of which are reserved for transient members. Approximately thirty or thirty-five of the unmarried members of the club occupy that number of the forty rooms. No dining room is provided in the building for the wives of members.

A house staff of approximately eighty-six employees is maintained, including a manager, librarian, chefs, bell boys, etc., so that there is complete service that goes with a fully equipped club where members live and spend their time. The value of the clubhouse and ground is approximately $950,000. The photographs of the clubhouse, which are in evidence, show a club of comfortable and commodious character. The clubhouse is well adapted to social entertainments. The club gives periodical dinners. During the years 1918 to 1924 the club's activities list more than 100 dinners and luncheons.

VII. Prior to prohibition the club possessed a wine room. The club's annual report for the year ending March 31, 1918, shows a loan made to the club of $20,000 for increased wine-room supplies.

The club's annual report for the year ending March 31, 1919, shows the average profit for the wine room in ordinary years to have been $1,000 a month. This report further states:

"The outlook under prohibition is far from discouraging. * * * Owing to the great amount of talent embraced in the membership, we are better equipped to weather the reconstruction storm, raised by prohibition, than any other club in the country. Our entertainments can be continued and even increased in number without exhausting the artistic resources of the club."

The club's annual report for the year ending March 31, 1920, contains the following:

"For the past twelve months the shadow of prohibition in an extremely drastic form has rested upon the club. It has influenced our financing; it advanced the date of our grove play. It has influenced the activities of the board of directors, the jinks and grove committees; and although we have now been fully initiated for seventy-five days, we have

not been able to draw the horoscope of our future. The tendency of the law as it now stands is unquestionably toward transference of social entertainment from hotel or club circles to the home fireside. Will we be able to preserve the interest in our club functions, dinners, jinks, or grove encampments, which has ever been a distinguishing feature of the Bohemian Club? * * * Special effort is being made for entertainment at this year's grove encampment. * * * The jinks committée is giving special consideration toward establishment of features which will increase the early evening attendance and practically revive the 'get-together' spirit which has made the club so popular a place of resort during the pre and after dinner hours. The board therefore earnestly urges the members to keep in mind that the fear and resulting depression has been largely the psychological result of the uncertainty of our future, rather than a conclusion based on specific results of the drastic prohibition enactment; and if all meet the situation with the true Bohemian spirit, there is no reason for doubt as to the continuance of the popularity and prosperity of the club.

"Notwithstanding the feeling of uncertainty above described, the club well maintained its reputation in the number and character of especially Bohemian features presented during the twelve months just ended."

The club reports for the years 1922 to 1926, inclusive, list among the club's activities annual golf tournaments at Del Monte, California, with a large number of members participating.

The 1925–26 report shows that the club championship was won by one Alan MacDonald, and gives the other prize winners.

These reports also show trap-shooting tournaments and aquatic sports listed among the club's activities.

"The Annals of the Bohemian Club" record several games of baseball played by the "Bohemian Club baseball nine."

The house rules of the Bohemian Club provide that, except when required for club purposes, members may have the use of the private dining rooms for the entertainment of guests, provided twelve hours' notice be given to the manager. The house rules further provide: "Members of clubs entitled to reciprocal relations with the Bohemian Club shall have the privilege of the club for a period of three months from

the date of presentation of credentials." Further provisions are made for other such reciprocal relations.

The by-laws of the club further provide that on request of a member a card may be issued to a nonresident of the city of San Francisco, living more than a hundred miles therefrom, which shall entitle him to the privileges of the club for a period of two weeks.

The motto of the club is "Weaving spiders come not here."

VIII. The club owns a magnificent virgin redwood grove in Sonoma County within convenient reach of San Francisco, where in midsummer of each year the "grove play" is produced. A natural amphitheater exists in this grove which has been equipped with a stage and which is provided with every facility for out-of-doors theatrical productions. The "grove play" is the high point in the life of the club and is produced in practically all of its phases through the efforts of club members. Occasionally some outside talent assists, but from the writing of the play, the building of the sets, the drilling of the cast, the music, designing of costumes, and acting it is primarily the work of the club. It is produced during the annual encampment, and during that time many other festivities are celebrated. These are all preliminary to the main event—the "grove play." During this time none but members and seventy-five nonresident guests are allowed in the grove. At all other times the grove is open for the use of members, their families, and guests, except that women are excluded after nightfall. Swimming, canoeing, and trap shooting are engaged in, camps are maintained by members, and during the encampment every facility is afforded for the feeding, lodging, and entertainment of those who attend. While much of the entertainment has high artistic merit, other exercises are in the lightest vein, and the whole program is such as to afford those attending a highly enjoyable two weeks.

IX. For several years annual art exhibitions have been held in the clubrooms, displaying the work of its members, in paintings, etchings, and sculpture. Other art exhibitions are also held here. The club is provided with galleries

equipped with daylight lamps for these exhibitions. The annual exhibit covers a period of two weeks and as many as 20,000 persons attend, including visitors who come by invitation of members.

X. The club has assisted struggling members who are artists, sculptors, and literary men by waiving their dues and by the purchase of their books, paintings, and sculpture. Exhibitions of artists' works have been held and the pictures in said exhibitions sold to raise a fund for them. The expense of publishing the books of younger poets, essayists, and writers, members of the club, has been borne by older club members, who were specifically recognized by the club for so doing.

XI. Many distinguished authors are members of the club and their works are in the club. Twenty-one literary publications of the Bohemian Club have been copyrighted and are on file in the Library of Congress at Washington, D. C. One of its grove plays has been produced at Monte Carlo.

Many men of prominence who are not in any way distinguished in the arts are members of the club, the nonprofessional members being largely in excess of the professional members as shown by Finding V.

XII. The club maintains a library of approximately 11,000 volumes, which are catalogued, with a librarian in attendance. There is a section of the library which contains the plays written by the members of the club and bound volumes of photographic records of the grove plays of the Bohemian Club, house plays, jinks, and other activities. Works of an artistic and literary quality, art journals, art magazines, and dramatic periodicals, and other periodicals are also to be found here. The library is in constant use by the members.

Several large bound volumes of " Bohemiana " collected by the historiographer of the club are located in a specially prepared stand in the court of the club, where they are open to the membership. The club maintains a musical library in addition to its regular library, and a musical librarian. It contains among its works 700 volumes, scores of well-known operas finely bound.

XIII. There are three musical organizations maintained by the club, the Bohemian Little Symphony Orchestra of fifty-six musicians, the Bohemian Club Brass Band of thirty-five players, and the Bohemian Club Chorus of sixty members. The club has produced original music in its grove plays and in its high and low jinks plays.

XIV. Actors, singers, painters, and authors have been entertained by the club and include such men as Joe Jefferson, Henry Irving, Coquelin, John Drew, Mansfield, Mantell, Crane, Ward, James, Ysaye, Paderewski, Leoncavallo, Hoffman, Heifetz, and Saint-Saens. The form of entertainment given for them consisted of a dinner and of original plays, original songs, and original playlets written and acted by the members of the club.

Entertainment of distinguished visitors is by no means limited to actors, musicians, authors, and the like. Soldiers, sailors, explorers—in fact, any man who is deemed worthy of being entertained—have been guests of the club.

XV. Literary nights are held by the club, in which a dinner is given and the evening devoted to some prominent literary man. Papers are read by the members of the club as to the life, character, and work of the person. Some of these were devoted to Tom Moore, Robert Burns, Oliver Wendell Holmes, the poet, and others.

XVI. While the Bohemian Club develops and encourages literature, painting, music, drama, in their various branches, and while the club's entertainments are generally of such a nature as to present talent in some form of what may be called "artistic expression," such entertainments are the chief feature of the club life and are usually planned to give pleasure rather than instruction to those attending.

The social activities of the club are extensive and elaborate and form a very material—even vital—part in the furtherance of the life of the organization. These social activities are not merely "incidental" to the artistic work of the club, but are so essentially a part of its activities as to constitute them the moving force in its maintenance.

The court decided that plaintiff was not entitled to recover.

Opinion of the Court

SINNOTT, *Judge*, delivered the opinion of the court:

The amount directly involved in this case is $32; but as we understand, indirectly an amount in excess of $100,000 is involved. The question before us in this case is whether or not the Bohemian Club of San Francisco, California, is a social club within the intent and meaning of section 810 of the revenue act of 1921, 42 Stat. 227, and section 501 of the revenue act of 1924, 43 Stat. 253. The pertinent provision of each of said acts imposes a tax on the amount paid as initiation fees, or dues, "to any social, athletic, or sporting club or organization." The pertinent Treasury regulations appear in regulations 43, article 4, where it is provided that "every club or organization having social, athletic, or sporting features, is presumed to be included within the meaning of the phrase 'any social, athletic, or sporting club or organization,' until the contrary has been proved, and the burden of proof is upon it." Article 5 of the same regulations provides that "any organization which maintains quarters, or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a 'social * * * club or organization,' within the meaning of the act, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, singing society, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features; but if the social features are a material purpose of the organization, then it is a 'social * * * club or organization' within the meaning of the act."

Plaintiff was a member of the Bohemian Club and as such member paid the taxes in question, the Commissioner of Internal Revenue holding "that the social features" of said club "are a material purpose of the organization and are of such nature and importance as to bring it within the class of social clubs" named in the several revenue acts providing

for the assessment of taxes on dues of members of a social, sporting, or athletic club.

The articles of incorporation of the club state that "it is designed to be, and is, a moral, beneficial association, and that its objects are the promotion of *social* and intellectual intercourse between journalists and other writers, artists, actors, and musicians (professional and amateur) and others associated by reason of knowledge and appreciation of polite literature, science, and the fine arts; and also the collection and preservation of records, memento, and archives illustrating the progress of literature, science, and art on the Pacific coast, and calculated to perpetuate the memory of those who have been, or shall be, instrumental in promoting such progress." The constitution subsequently adopted states its objects to be for the association of gentlemen connected professionally with literature, art, music, the drama, and also those who by reason of their love or appreciation of these objects may be deemed eligible.

Membership in the club is not confined to the professions above named. The so-called nonprofessional membership exceeds the professional membership, as is shown in Finding V.

The club has a large, well-appointed, and comfortable club building in the city of San Francisco, of the value of $950,-000, which contains a dining room, seating approximately 350 persons, where the periodical dinners of the club are held. It also has kitchens, storerooms, checking rooms, a barber shop, and a general lounging room, with papers and periodicals on the tables. It also has a card room. A house staff of approximately eighty-six employees is maintained, including a manager, librarian, chefs, bell boys, etc. On the second and third floors of the club are forty bedrooms, some of which are reserved for transient members. Approximately thirty or thirty-five of the unmarried members of the club occupy rooms therein. The plaintiff herein admitted that the club has the "complete service that goes with a fully equipped club, where members live and spend their time." Prior to prohibition the club had a bar and wine room which made an average profit of $1,000 a month. A part of this

bar has been cut away for a candy and cigar display stand, where nonalcoholic beverages are served.

Finding VI indicates that the club building is well adapted to social entertainment. Members may enjoy the use of the private dining rooms for the entertainment of their guests. The house rules provide that members of clubs entitled to reciprocal relations with the Bohemian Club shall have the privilege of the club for the period of three months. The by-laws provide that on request of a member a card may be issued to a nonresident of the city of San Francisco living more than a hundred miles therefrom, which shall entitle him to the privilege of the club for a period of two weeks.

The club's annual report for the year 1920 discusses with apprehension the effect of prohibition upon the club's activities and financing, as well as upon the club's social entertainments, as is shown in Finding VII. The probative force of this on the issues herein is obvious, without comment, as a mere reading of Finding VII will disclose.

The club reports list among the club's activities annual golf tournaments, trap shooting, and water sports. The club has entertained many distinguished visitors. Such entertainment was not limited to actors, musicians, authors, and the like. Soldiers, sailors, explorers—in fact, any man who is deemed worthy of being entertained—have been guests of the club. These guests, as a rule, at the entertainment in turn entertained the club. We can see little in the evidence in this case to differentiate the facilities of the club house for entertainment from the facilities for entertainment of the club house in the case of *Faculty Club of the University of California* v. *United States*, 65 C. Cls. 754, and *John Fisler* v. *United States*, decided by the Court of Claims, October 28, 1928, *ante*, p. 220, except for the lack of bowling, tennis, and billiards.

One of the predominant purposes of the club, as described in the articles of incorporation, is "the promotion of *social* and intellectual intercourse between journalists and other writers, artists, actors, and musicians," etc.

The above excerpt from the articles of incorporation of the Bohemian Club brings the club clearly within the pur-

view of the language employed by Judge Moss in the *Faculty Club of the University of California case*, *supra*, where he states:

"The predominant purpose of this club as described in its constitution is *to promote mutual acquaintance* and *fellowship among the officers of instruction of the university.* This is plainly the expression of a purely social purpose."

Judge Moss makes the further pertinent comment, which is applicable to the Bohemian Club:

"To hold that '*its social features are not a material purpose of the organization*,' or that its purposes and activities are '*merely incidental* to the active furtherance of a *different* and *predominant* purpose,' would be contrary to the declared purposes of its organization and to the usual and customary social activities of the club throughout the twenty-six years of its existence."

We are not unmindful of the contention of plaintiff that the predominant purposes of the Bohemian Club are the furtherance of art, literature, music, and the drama, and that it is an association of gentlemen connected professionally with literature, art, music, and the drama, and also those who by reason of their love or appreciation of these objects may be deemed eligible, and that the few social features it has are merely incidental and that it is in no sense a social club.

We have carefully examined the record, in view of this contention, but are unable to agree with it. The record justifies us in applying to the Bohemian Club the language of Judge Green with reference to the Manufacturers' Club of Philadelphia in the case of *John Fisler* v. *United States*, *supra:*

"It is probable that there are few clubs of a purely social nature anywhere in this country that make such elaborate provisions for social enjoyment."

We have carefully read "The Annals of the Bohemian Club," the three volumes, nearly 800 pages (plaintiff's Exhibits 7, 7A, and 7B), which delightfully depict the history of the club from 1872 to 1895. They fully justify the claim that the social features of the club are a material purpose of the organization. The social activities therein shown were so extensive as to make it clear that they were a mate-

rial part of the activities of the club organization. These "Annals" present repeated appeals and references by club members to the spirit of "good fellowship." While the "Annals" chronical many activities on the part of the club in the furtherance of "art for art's sake," at the same time they present a picture of "feasts convivial," of skits, travesties, and burlesques, of Gridiron Club standard and excellence, of—

> "Sport that wrinkled care derides
> And laughter holding both his sides."

To ignore the picture presented by the club functions and in the "Annals" and thereby to hold that the social features therein depicted were not a material purpose of the organization would be to ignore common knowledge of the traits, customs, and habits of man as a gregarious "social animal." We can not entertain the view that such social activities were all incidental and subordinate to the furtherance of art, literature, etc., and consequently were not material purposes of the organization.

We have reached the conclusion that the Bohemian Club is a social club within the meaning of the taxing statutes. It is ordered and adjudged that plaintiff's petition be dismissed.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JOHNSTOWN COAL & COKE CO. v. THE UNITED STATES

[No. H–126. Decided January 7, 1929]

On the Proofs

Contract for coal; requirements; failure to designate.—Under a contract for coal the Government could take a greater or less quantity, not to exceed 50 per cent, than the estimated amount, according to the actual requirements of the service, the coal to be delivered "in such quantities at such times as the Govern-

ment may direct." The Government called for and there was delivered to it approximately 17 per cent only of the estimated amount, but during the contract period the Government did not at any time indicate that it would take less than the amount estimated. *Held*, that the Government, unless its actual requirements were less, was obligated to take the estimated quantity. In the calculation of damages the contractor is to be allowed the excess of the price named over the market price at time of expiration of contract, on the difference between the quantity delivered and the quantity estimated.

The Reporter's statement of the case:

Mr. Ewing H. Scott for the plaintiff. *Graham & Yost* were on the brief.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation, whose officers are loyal citizens of the United States, and were engaged as sales agents in buying and selling coal at the time of entering into the contract hereinafter mentioned, and are now the owners of this claim.

II. On April 1st, 1923, defendant's Veterans' Bureau issued a circular proposal for furnishing coal to its hospitals and vocational schools during the fiscal year ending June 30, 1924, as specified in schedules which appear on page nine of plaintiff's petition and are by reference made part of this finding.

III. On May 18th, 1923, plaintiff, in accordance with the requirements of the proposal, filed its bid and offered to furnish to the Veterans' Bureau hospital or vocational school at Locust Point, Maryland, an estimated quantity of coal, 8,200 tons of 2,000 pounds, the description, kind, quality, analysis, and price of which more fully appear on page seven of plaintiff's petition, and by reference made part of this finding.

IV. On July 16, 1923, plaintiff and defendant entered into a written contract in accordance with said circular and proposal above referred to in Findings II and III. Said con-

Reporter's Statement of the Case

tract is attached to plaintiff's petition on page five and is made a part of this finding by reference.

V. During the period of the contract, and in accordance therewith, defendant made calls for, and plaintiff delivered to, the United States Veterans' Hospital No. 56 at Locust Point, Maryland, the following tonnage of coal:

Date of shipment	Tons
October 20, 1923	200.95
October 25, 1923	314.50
January 16, 1924	55.80
January 17, 1924	227.90
January 18, 1924	281.30
February 11, 1924	107.85
February 12, 1924	168.30
Total	1,408.10

The balance undelivered under the estimated amount of the contract was 6,791.9 tons. All the coal so delivered and received was paid for by defendant.

VI. Although the contract called for coal the product of the Montel Mine, which is classified as Pool 10, that product was not furnished, because during the time of deliveries referred to in Finding V operation in said Montel Mine was temporarily discontinued. Plaintiff secured permission from defendant to substitute another coal, approximately as good, the classification of which was Pool 9, which was the coal delivered, accepted, and paid for. After delivery and acceptance of said substituted coal and during the term of said contract the Montel Mine resumed operation.

VII. Plaintiff repeatedly requested defendant for permission to deliver the remainder of the coal called for by the contract. No permission or orders therefor were ever received by plaintiff, nor was plaintiff notified at any time during the life of said contract that the defendant would diminish its order, as it had a right to do thereunder. However, several weeks after the expiration of the contract defendant notified the plaintiff that an offer of delivery of a less amount by plaintiff might be considered. Plaintiff refused to make the offer.

VIII. The price of Montel coal at the time of the expiration of said contract was not in excess of $2.00 per ton. The

average price thereof for the time subsequent to the last delivery and the termination of the contract was $1.93 plus per ton.

IX. The difference between the price contracted for and at the time of the expiration of the contract was $1.00 per ton, and the difference on the average cost thereof is $1.07 per ton.

X. Should plaintiff be entitled to recover on the difference between the amounts specified in the contract—to wit, 8,200 tons—and the coal delivered, 1,408.10 tons at the rate of $1.00 per ton, the amount would be $6,791.90, and at the rate of $1.07 the amount would be $7,267.35. Should recovery be on the basis of the difference between the amount claimed by defendant—to wit, 4,100 tons—and the 1,408.10 tons delivered at $1.00 per ton, the amount due would be $2,691.90, but if on the basis of $1.07 per ton the amount would be $2,880.33.

The court decided that plaintiff was entitled to recover $6,791.90.

MOSS, *Judge*, delivered the opinion of the court:

On July 16, 1923, a contract was entered into by and between plaintiff, Johnstown Coal & Coke Company, and the Government of the United States, by which plaintiff agreed to supply coal to the Government at the Veterans' Bureau Hospital at Locust Point, Maryland, at $3.00 per ton for the period from July 1, 1923, to June 30, 1924. The total quantity to be supplied was estimated at 8,200 tons, to be delivered in such quantities and at such times as the Government might direct through its officer in charge of said hospital. The Government actually ordered and there were delivered to it during the contract period only 1,400 tons. Plaintiff is suing for the recovery of $6,800, which is the difference between the contract price of the 6,800 tons not ordered and the market price of same, which it is agreed was $1.00 per ton.

The contract did not specify any particular time or times for the delivery of the coal. It was to be delivered as

ordered. The provision of the contract on that point is as follows:

"The coal shall be delivered in such quantities at such times as the Government may direct. All available storage capacity of the Government coal bunkers shall be placed at the disposal of the contractor to facilitate delivery of coal under favorable conditions. Deliveries shall be subject to the call of the officer in charge of the hospital or vocational school and made in the type of car that he requires and shall extend, when necessary, over the entire contractual period, July 1, 1923, to June 30, 1924, inclusive."

The contract contained another provision which reads as follows:

"The estimated quantity of coal in short tons of 2,000 pounds to be purchased is based upon the previous annual consumption, but the right is reserved to order a greater or less quantity, not to exceed fifty per cent, according to the actual requirements of the service."

Orders were made at various times, and coal was delivered in response thereto, in the aggregate quantity of 1,400 tons. Plaintiff repeatedly requested permission to deliver the remainder of the coal called for by the contract, but no additional orders were made, nor was plaintiff ever advised during the contract period that defendant did not intend to order further deliveries. After the expiration of the contract, and in response to a letter from plaintiff concerning defendant's failure to fulfill its contract, and offering to deliver the remaining 6,800 tons, plaintiff was advised by letter of date July 24, 1924, that "in the interest of the Government, the hospital at Locust Point was closed during the fiscal year 1924, and it was necessary to order only so much coal as would meet the requirements of the subdistrict office maintained at that point." Reference was also made to the reserved right of the Government to order a greater or less quantity, not to exceed fifty per cent of the estimated quantity, with the assertion that the delivery of 4,100 tons would have constituted full performance of the contract. It was suggested, however, in said letter that plaintiff should agree to release the Government from further obligation under the contract. This was followed by a telegram dated August 9, 1924, in which it was stated, "To effect amicable

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agreement, bureau will consider placing order balance of fifty per cent of estimated amount which is twenty-seven hundred tons." This proposal was declined.

This was a requirement contract. The estimated quantity of 8,200 tons was "based upon the previous annual consumption." The Government reserved the right, however, to take as much as fifty per cent in excess of the estimated quantity, or, as much as fifty per cent less than the estimated quantity, "*according to the actual requirements of the service*."

Under the plain terms of the contract defendant was obligated to take the estimated quantity unless the *actual requirements* demanded a less quantity, and in that event, only to the extent of fifty per cent less than the estimated amount. Defendant had no arbitrary right to reduce the quantity in any degree. Its right in that respect would depend on the actual requirements of the service, and the requirements of the service were peculiarly within the knowledge of defendant. There is no contention that plaintiff had any knowledge whatever during the contract period that defendant would require less than the estimated quantity of 8,200 tons. It was therefore necessary for plaintiff to be prepared during the entire period of the contract to deliver the full quantity. It should be noted in this connection that plaintiff was required to execute a bond for the faithful performance of the contract in the sum of $4,400.00, the amount being based on the estimated quantity of 8,200 tons, and an additional quantity of fifty per cent, or 12,300 tons. The market price of coal was reduced for the period in question from $3.00 to $2.00 per ton. Plaintiff being without fault in this transaction is entitled to the benefits growing out of its contract with the Government, and defendant may not excuse itself from its obligation to take the estimated quantity of 8,200 tons except upon a showing that the actual requirements of the service demanded a less quantity. The burden on this point rests upon defendant, and it has introduced no evidence whatever.

Plaintiff is entitled to recover on the difference between the quantity of coal estimated in the contract—to wit, 8,200 tons—and the coal ordered and delivered—1,408.10 tons—

at the rate of $1.00 per ton, $6,791.90. *International Paper Co.* v. *Beacon Oil Co.*, 290 Fed. 45, 52, 53.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JOHN T. AIKINS v. THE UNITED STATES

[No. C-945. Decided January 7, 1929]

On the Proofs

Uniform gratuity, Marine corps; appointment without compliance with statute.—Appointment as an officer in the Marine Corps without the examination prescribed by the act of August 29, 1916, is not valid, and suit can not be maintained by the *de facto* officer for uniform gratuity not paid him. See *Beeman* v. *United States*, 65 C. Cls. 431.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *Mr. Cornelius H. Bull* and *King & King* were on the brief.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. J. J. Lenihan* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff applied for enlistment in the U. S. Marine Corps at Minneapolis, Minnesota, April 7, 1917, and was enlisted April 13, 1917, at the Marine Barracks, Mare Island, California.

He was honorably discharged December 15, 1918, to enroll as a 2nd lieutenant in the Marine Corps Reserve, and he was enrolled in said Marine Corps Reserve as a 2nd lieutenant (provisional) in class 4, December 16, 1918, and reported the same date for duty at the marine barracks at Quantico, Virginia. Said appointment was made with-

out the examination prescribed in the act of August 29, 1916, 39 Stat. 587.

II. Upon reporting for active duty in said reserve force, plaintiff was required to and did sign a waiver of $150 clothing gratuity.

III. Upon reporting for active duty in the United States Marine Corps reserve force on December 16, 1918, and upon enrollment as a 2nd lieutenant (provisional) in said reserve force, plaintiff was not paid $150 uniform gratuity.

If plaintiff should be found entitled to receive uniform gratuity, the amount due him would be $150.

The court decided that plaintiff was not entitled to recover.

MEMORANDUM BY THE COURT

Plaintiff was appointed to the provisional rank of 2nd lieutenant in the Marine Corps Reserve on December 16, 1918, without the examination prescribed by the act of August 29, 1916, 39 Stat. 587, which reads as follows:

"No person shall be appointed or commissioned as an officer in any rank in any class of the Naval Reserve Force, or promoted to a higher rank therein, unless he shall have been examined and recommended for such appointment, commission, or promotion by a board of three naval officers not below the rank of lieutenant commander nor until he shall have been found physically qualified by a board of medical officers to perform the duties required in time of war, * * *."

Plaintiff is seeking to recover the uniform gratuity of $150 provided for by said act. The case is controlled by the decision of this court in *Otis Beeman* v. *United States*, D–129, decided April 16, 1928, 65 C. Cls. 431, and the cases therein cited. Plaintiff is not entitled to recover, and the petition will be dismissed.

S. S. WHITE DENTAL MANUFACTURING CO. OF PENNSYLVANIA v. THE UNITED STATES [1]

[No. J-612. Decided January 7, 1929]

On Demurrer to Petition

Interest on judgment; mandate of Supreme Court; sec. 177, Judicial Code, as amended.—On a mandate of the Supreme Court, filed in the Court of Claims June 27, 1927, directing judgment in a tax case in favor of plaintiff with interest to date of judgment, interest is not allowable under the amendment of May 29, 1928, to sec. 177, Judicial Code, notwithstanding pending disposition of an additional claim, the judgment was not settled by the Comptroller General until after the effective date of the amendment.

The Reporter's statement of the case:

Mr. Charles R. Pollard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the demurrer.

Mr. John F. McCarron, opposed. *Mr. Charles J. Brown* was on the brief.

The material averments of the petition are stated in the following

MEMORANDUM BY THE COURT

This case is before us on defendant's demurrer to the petition, first, on the ground that petition does not constitute a cause of action within the jurisdiction of this court; second, petition fails to state facts sufficient to constitute a cause of action against defendant.

The following are the facts:

This court rendered judgment in the case of *S. S. White Dental Manufacturing Co. of Pennsylvania* v. *United States* (61 C. Cls. 143, 165), on November 10, 1925, and thereby awarded to the plaintiff the sum of $83,813.59 with interest.

On May 16, 1927, the Supreme Court affirmed the judgment of this court in the case of *United States* v. *S. S. White Dental Manufacturing Co. of Pennsylvania* (274 U. S. 398),

[1] Certiorari denied.

and its mandate was filed in this court on June 27, 1927, and contained the following direction:

"The court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of eighty-three thousand eight hundred thirteen dollars and fifty-nine cents ($83,813.59), with interest thereon at the rate of 6 per cent per annum from November 14, 1923, to the date of this judgment."

On July 1, 1927, the plaintiff filed with the Commissioner of Internal Revenue its judgment refund claim for $83,813.59 for payment, and asked interest thereon at the rate of 6 per cent per annum from November 14, 1923, to the date of the Supreme Court mandate on June 27, 1927.

The Commissioner of Internal Revenue in due course forwarded said judgment claim to the Comptroller General of the United States for settlement, and under date of November 10, 1927, plaintiff requested the Comptroller General, by letter, to withhold payment of its claim pending disposition of an additional claim by the General Counsel's Office, and informed the Comptroller General that he would be promptly notified of such disposition of the additional claim, at which time "you can then proceed to settle this claim for $83,813.59 with interest from November 14, 1923, to June 27, 1927."

On May 29, 1928, the revenue act of 1928, Public 562, was approved. Section 615 of said act, amending section 177 of the Judicial Code, as amended, is as follows:

"(a) Section 177 of the Judicial Code, as amended is amended to read as follows:

"'Sec. 177. (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

"'(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon

the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.'

"(*b*) Subsection (a) of this section shall take effect on the expiration of thirty days after the enactment of this act."

On June 29, 1928, plaintiff filed with the Comptroller General of the United States a letter dated June 28, 1928, in which plaintiff stated that the Bureau of Internal Revenue had acted upon the additional claim and requested the comptroller to proceed to settle its judgment claim for $83,813.59, with interest.

Under date of July 10, 1928, the Comptroller General of the United States settled plaintiff's judgment claim in the amount of $101,999.97, and held that the proper amount of interest allowable in this case was $18,186.38, being interest from November 14, 1923, to June 27, 1927, the date of mandate of the Supreme Court.

Plaintiff under date of July 13, 1928, wrote to the Comptroller General of the United States requesting reconsideration of said settlement on the ground that additional interest is due plaintiff under said section 615 of the revenue act of 1928, *supra*, for the period from June 27, 1927, to July 11, 1928, and requested that it be permitted to cash the Treasury check for $101,999.97, without prejudice of its rights on account of plaintiff's claim for additional interest on its said judgment claim.

The Comptroller General replied by letter of July 13, 1928, informing plaintiff that no objection would be interposed to cashing said check; that such action would be without prejudice to its right to seek further review of the claim for additional interest.

On August 7, 1928, the Comptroller adhered to his original settlement and refused to pay plaintiff the additional interest requested from June 27, 1927, to July 10, 1928, on the ground that plaintiff was not entitled to interest during that period under the provisions of section 615 of the revenue act of 1928. On August 17, 1928, plaintiff requested the Comptroller General in writing to reconsider his decision of August 7, 1928. Under date of September 1, 1928, the Comptroller General, by letter to plaintiff, again adhered to

Syllabus

his decision of August 7, 1928, and refused to pay the additional interest.

It is the contention of plaintiff that section 615 of the revenue act of 1928 is applicable and that it should be paid the additional interest from June 27, 1927, the date of the mandate of the Supreme Court, to July 10, 1928. On the date of the mandate of the Supreme Court, June 27, 1927, section 177 of the Judicial Code, as amended (44 Stat. 119), provided for the allowance of the interest in any judgment of any court to date of entry of final judgment. The Comptroller General so allowed interest to plaintiff. We think the comptroller was correct, for the reason that section 615 of the revenue act of 1928 was given no retroactive effect by Congress.

The Supreme Court in the case of *United States* v. *Magnolia Petroleum Co.*, decided February 20, 1928, 276 U. S. 160, held:

"Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears. *United States* v. *Heth*, 3 Cranch 399, 413; *White* v. *United States*, 191 U. S. 545, 552; *Shwab* v. *Doyle*, 258 U. S. 529, 534."

Defendant's demurrer that the petition fails to state facts sufficient for cause of action against the United States will be sustained. Petition is dismissed. It is so ordered.

MARYLAND DREDGING & CONTRACTING CO. v. THE UNITED STATES

[No. F-289. Decided February 4, 1929]

On the Proofs

Contract for dredging; finality of contracting officer's findings.—Where in a contract for Army dredging it is provided that "the findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final," the action of the Comptroller General in refusing payment of items found due by such findings, there being no question of good faith involved, was unauthorized.

Same; extra work.—Where a contract for dredging requires the "removal and disposition of all material encountered, except ledge rock," and defines ledge rock, stating that it "shall not include fragments of rock or boulders capable of being raised by the dredge in one piece," removal by the dredge of pieces of ledge rock incidental to the main operation of dredging other material does not entitle the contractor to extra compensation.

The Reporter's statement of the case:

Mr. Harry L. Underwood for the plaintiff. *Quigley & Hammers* were on the briefs.

Mr. Edwin S. McCrary, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff herein, Maryland Dredging & Contracting Company, is a corporation duly organized and existing under the laws of the State of Delaware, and has its principal office and place of business at Baltimore, Maryland. Its stockholders are citizens of the United States.

II. On August 22, 1919, after due advertisement, a contract was made and duly executed by and between W. B. Ladue, Colonel of Engineers, United States Army, therein designated as the contracting officer representing the United States of America as party of the first part, and the Maryland Dredging & Contracting Company designated as the contractor as party of the second part, whereby it was agreed that:

"In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish all the necessary plant and appliances, and therewith excavate a channel in the Schuylkill River, within the area designated as section 4 by paragraph 24 of the said specifications.

"In consideration of the full and faithful performance of the several promises, undertakings, and agreements herein contained, to be kept and performed by the said contractor, the contracting officer hereby agrees to pay to the said contractor the sum of twenty-nine cents ($0.29) per cubic yard, place measurement, for all material removed from said channel and disposed of in accordance with this agreement."

This contract was duly approved by the Chief of Engineers, United States Army, on September 13, 1919. A copy of the said contract and of the specifications are set forth in plaintiff's Exhibit A, attached to the petition, and are made a part of this finding by reference.

III. The location of the work to be performed under this contract was stated in paragraph 24 of the specifications to be between station 20+270 and 25+860, and the work was particularly described in said paragraph thus:

"The work to be done will also include the excavation of a channel with a least depth of 26 feet at mean low water and bottom width of 200 feet, from Passyunk Avenue Bridge (station 20+270) to Gibson's Point (about station 25+860), a length of 5,590 feet * * *."

IV. A copy of the contract as executed was received by plaintiff September 19, 1919, and operations thereunder were begun within the time fixed by the contract. The work required thereunder has been fully performed by the contractor and approved and accepted by the United States.

V. During the performance of the work the contractor removed from the area covered by the contract 51,726 cubic yards of material which had slid into the channel by reason of the caving in of the side slopes. This removal was done pursuant to the instructions and directions of the contracting officer.

The amount of the material removed was based upon surveys and calculations made by the United States Engineer Office at Philadelphia, Pennsylvania.

The specifications by paragraph 25 made provision for payment for removal of material deposited as this material was deposited. Said paragraph 25 is as follows:

"To cover mechanical inaccuracies of dredging processes material removed to a depth of not more than 1 foot below the required depth will be estimated and paid for at full contract price. The contracting officer will indicate the provision to be made for the side slopes of the dredged cut, and material which is actually removed on his order in quantities deemed sufficient by him to provide for side slopes not flatter than one on five, whether dredged in original position or after having fallen into the cut, will be estimated and paid for. Material taken from beyond

the limits above described will be deducted from the estimates as excessive overdepth dredging or excessive side-slope dredging, and will not be paid for."

Claim was made by the contractor for payment for this removal in the sum of $15,000.54, being at the rate of twenty-nine cents per cubic yard; said claim was approved by the contracting officer and by the Chief of Engineers, United States Army. The Comptroller General of the United States also held that payment of said claim was proper. No payment has been made, either of this sum or any other, on account of this particular work.

VI. The contractor at the instance and request of the proper officials of the United States furnished meals to inspectors employed upon the work by the United States, and to United States agents visiting the work on official business.

The furnishing of meals was provided for by paragraph 38 of the specifications. That paragraph in part is as follows:

"If the contractor maintains on this work an establishment for the subsistence of his own employees, he shall, when required, furnish to inspectors employed on the work, and to all United States agents who may visit the work on official business, meals of a quality satisfactory to the contracting officer. The meals furnished will be paid for by the United States at the rate of thirty (30) cents per person for each meal."

Claim therefor at the rate of 30 cents per person per meal was made and presented to the contracting officer. Said claim in the sum of $170.20 was found to be correct and due, by the contracting officer, and this finding was approved by the Chief of Engineers of the United States Army. The latter so reported to the Comptroller General of the United States, who, however, allowed only $150.60 for and on account of said claim, but neither payment of that sum nor of the amount claimed for said meals has been made.

VII. As operations under the contract progressed, payments were made from time to time to the contractor to cover the work done. From one of the sums found due and payable to contractor for work performed there was deducted and withheld $996.26. This amount was deducted

and withheld to cover increased cost of inspection held to be payable by the contractor for the period January 1 to March 31, 1920. This deduction is shown on voucher 65 of the June, 1920, account of Lt. Col. W. B. Ladue. Thereafter it was found and determined and so reported by the War Department to the Comptroller General that the actual cost of this inspection properly chargeable to contractor was $798.12. The Comptroller General of the United States found that there was due and payable to contractor the difference between the two sums specified, namely, $198.14. Payment of said sum of $198.14 has not been made nor any part thereof.

VIII. Paragraph 15 of the specifications required the contractor to commence work under the contract within 60 days after the date of receipt by it of notification of approval of the contract by the Chief of Engineers and to complete it within the time after the limiting date fixed for commencement, determined by applying to the total quantity of materials to be paid for actually removed the average monthly rate stated in paragraph 24 of the specifications, viz, 45,000 cubic yards per month, scow measurement, or 40,909 cubic yards, place measurement.

The contractor acknowledged receipt of notice of approval of the contract on September 19, 1919, thus fixing November 18, 1919, as date of commencement of work. The contractor was not required to work between December 31 and March 15. Applying the rate of progress required to the amount of material removed, the result is 10 months and 23 days, exclusive of the winter period when work was not required, as the time within which the work should have been completed and fixes December 26, 1920, as the date for completion. This was five days short of entering the winter period excepted under the contract in computing the contract period. The contract was actually completed January 28, 1921.

From the last payment made to contractor there was deducted the sum of $2,822.46, designated as "Amount withheld pending determination of extension of time to be allowed for the completion of contract beyond the time limit

originally fixed, and the corresponding adjustment of cost of superintendence and inspection."

The plaintiff was delayed in completing the work required under the contract because of its inability to secure coal necessary for the operation of its dredges due to a coal shortage. Plaintiff applied to the contracting officer for authority to suspend work of dredging because of said shortage; said request was granted. The contracting officer experienced like difficulty in securing coal for the Government's own dredges.

The plaintiff was also delayed in completing the work on account of the encountering of ledge rock.

The contracting officer recommended the payment to plaintiff of the amount withheld for superintendence and inspection charges, $2,822.46. The Chief of Engineers concurred in that recommendation and expressly found that the inability to secure coal was an unforeseeable cause of delay within the meaning of article 5 of the contract.

Article 5 of the contract provides:

"* * * That no charge for inspection and superintendence shall be made for such period after the date fixed for completion of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from delivering the material or commencing or completing the work within the period required by the contract. The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final. * * *"

Notwithstanding the finding of the contracting officer and the Chief of Engineers that the inability to secure coal was an unforeseeable cause of delay within the meaning of article 5 of the contract and that the delay was excusable, the Comptroller General of the United States held that the delay was not excusable and declined to relieve the plaintiff from the

cost of superintendence and inspection for the period December 27, 1920, to January 28, 1921. The cost of inspection and superintendence for that period was $1,196.09 instead of $2,822.46, which had been deducted, and it was found that there was a balance due plaintiff of $1,626.37.

IX. Paragraphs 27 and 28 of the specifications are as follows:

"*Character of materials.*—During the period from January 7 to February 18, 1916, the United States made a number of test probings, as shown on drawings Nos. 2489, 2490, 2491, 2492, and 2493 for the purpose of ascertaining as far as practicable the general character of the material to be dredged under these specifications. Some of these probings were made by hand from a tug, using a steel-pointed, 1½-inch diameter pipe fastened to the lower end of a spar of 3-inch diameter, and the remainder were made with a pile driver using a 2-inch steel rod and a 900-pound drop hammer. The method of making each probing and the tabulated results are shown on the above-mentioned drawings. The material encountered above the proposed grade of the bottom was soft mud, firm mud, clay, hard sand, and gravel. Rock was encountered, generally below grade, in some of the probings.

"The material to be removed is believed to be as stated above, but bidders are expected to examine the work and decide for themselves as to its character, as the United States does not guarantee that the results of these test probings represent the exact character of all the material that will be encountered during the progress of the work.

"*Work covered by price bid.*—The price bid per cubic yard for dredging shall cover the cost of removal and disposition of all material encountered, except ledge rock. The removal of ledge rock, if found, will not be required; such work, if necessary, will be made the subject of separate contracts. Material to be classified as ledge rock must be of such composition as, in the opinion of the contracting officer, shall require blasting for its removal and shall not include fragments of rock or boulders capable of being raised by the dredge in one piece.

"Should ledge rock be encountered, the contractor shall remove therefrom all such overlying materials as, in the judgment of the contracting officer, can be removed by the use of the plant specified in the accepted proposal, or the equivalent of such plant."

During the progress of the work under the contract the plaintiff encountered in its dredging operations ledge rock

above the specified grade to which dredging was to be prosecuted, 26 feet. This rock was encountered by the dredge *Capitol* mainly during the period October, 1920, to January, 1921, at sections 23+029 to 23+592, 25+456, and 25+860.

The operations of the dredge and the effect upon it when this rock was encountered were as follows:

When the dipper of the dredge went down into the water it would sometimes get underneath the rock and break or tear off pieces of the rock; at other times the bucket would merely scrape over the rock and bring up nothing but water; at other times the bucket would scrape off from the rock and bring up overlying material, such as mud, sand, gravel, cobblestones, and boulders, being the usual material encountered throughout this work, and until the end of the time that contractor was employed on this work the dredge continued to bring up and remove such overlying material. When the dipper struck the edge of the rock the dredge would stop, shake, and strain all over; the engine would stall.

During this four-month period, two manganese bucket lips were worn off; the normal life of these lips in sand and gravel excavating is 6 months to 1 year.

X. The rock material thus encountered by the dredge is described by the several witnesses thus: Stone, solid rock, granite; pieces of rock broken off from the ledge with no smooth edges, ledge rock; rock that would break into a slab; granite formation; very hard ledge rock.

XI. The encountering of this ledge rock was reported by representatives of the plaintiff to the contracting officer and to his subordinates in the office of the district engineer at Philadelphia and protests were made against continuing operations in attempting to make grade in that material. As a result of conferences between plaintiff's representatives and the contracting officer and some of his subordinates, and protests by the former, the contracting officer, Colonel Ladue and his principal assistant, Mr. Shuman, visited the site of the dredging operations and made an investigation, the dredge being operated at different points over the area; they were shown pieces of the rock which had been brought

up by the dredge and tests were made to show the character of it by putting a bar on the rock and striking it with a sledge; the bar bounded off the rock without penetrating it.

The plaintiff was finally given a release on this area and the section was accepted by the contracting officer, although the grade required by the terms of the contract had not been made in all places.

XII. The amount of rock removed by plaintiff from the area covered by contract was 2,295.95 cubic yards, but just how much of this was broken off from the ledge by plaintiff's dredge does not appear.

XIII. The fair market price for dredging the rock material at the time when removed by plaintiff was about $14.89 to $18.50 per cubic yard.

XIV. After the completion and acceptance of the work of plaintiff under the contract, the United States in September, 1921, let a contract to P. Sanford Ross for the removal of ledge rock in the same area as that dredged by plaintiff the price specified in that contract for ledge rock removal being $14.89 per cubic yard. The rock removed under that contract was of the same kind and character as that removed by plaintiff.

In the specifications for that later contract the ledge rock to be dredged was defined thus:

"The ledge rock is believed to consist of mica, schist or gneiss, which will require drilling and blasting before it can be removed, although some of it is believed to be partly decomposed."

XV. During the period when this ledge rock was being encountered and plaintiff protested against being required to dredge it, the contracting officer at first refused to admit that it was ledge rock and ordered the contractor to proceed with the dredging operations removing all loose rock and boulders, as well as overburden or overlying materials, as near as possible to the established grade. The contractor continued to do this work about three months after first encountering this rock and during this time removed considerable mud, sand, gravel, cobblestones, and boulders, and in addition thereto occasional pieces of rock that would

break off from the ledge. After making his protest and being ordered to continue, the contractor removed such overlying material, as well as pieces of rock, until work on the job stopped in January, 1921.

The court decided that plaintiff was entitled to recover, in part.

SINNOTT, *Judge*, delivered the opinion of the court:

Plaintiff herein seeks to recover from defendant the sum of $54,087.60, in connection with a certain contract which was entered into on August 19, 1919, with the United States for dredging in the Schuylkill River at Philadelphia. Plaintiff's claim consists of five items:

1. For slope dredging	$15,000.54
2. For meals furnished Government employees	170.20
3. Excess deductions made for inspection and superintendence	198.14
4. Withheld for superintendence and inspection charges	2,822.46
5. Ledge rock excavation	35,896.26
Total	54,087.60

The above item (1), $15,000.54, was approved by the contracting officer and by the Chief of Engineers of the United States Army. The Comptroller General of the United States also held that payment of said item was proper. (Finding V.)

Item (2), $170.20, was found to be correct and due plaintiff by the contracting officer, and this finding was approved by the Chief of Engineers of the United States Army, but was allowed by the Comptroller General of the United States in the sum of $150.60 only. (Finding VI.)

Item (3), $198.14, was allowed by the War Department and also by the Comptroller General of the United States. (Finding VII.)

Item (4) was recommended to be paid plaintiff by the contracting officer, with the approval of the Chief of Engineers, which recommendation was disapproved by the Comptroller General of the United States, who approved the recommendation only in the sum of $1,626.37.

The above four items, aggregating $18,191.34, make up the sum allowed plaintiff in our conclusion of law herein.

Notwithstanding the disallowance by the Comptroller General of item (4), except for the sum of $1,626.37, we think the full amount of $2,822.46 should be allowed the plaintiff. This amount was recommended for payment by the contracting officer, with the approval of the Chief of Engineers. Article 5 of the contract here involved, set forth in Finding VIII, provides:

" The findings of the contracting officer approved by the Chief of Engineers, shall be accepted by the parties hereto as final."

Said article 5, as set forth in Finding VIII, further provides:

" That no charge for inspection and superintendence shall be made for such period after the date fixed for completion of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through * * *, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from delivering the material or commencing or completing the work within the period required by the contract."

From the last payment made to the contractor there was withheld the sum of $2,822.46, which constitutes item (4), designated as " amount withheld pending determination of extension of time to be allowed for the completion of the contract beyond the time limit originally fixed and the corresponding adjustment of cost of superintendence and inspection."

The above reference is to plaintiff's delay in completing the work required under the contract because of its inability to secure coal necessary for the operation of its dredges due to a coal shortage. Plaintiff applied to the contracting officer for authority to suspend work or dredging because of said shortage. This request was granted. The contracting officer experienced like difficulty in securing coal for the Government's own dredges. The contracting officer recommended the payment to plaintiff of the said amount of $2,822.46. This recommendation was concurred in by the Chief of Engineers, who expressly found that plaintiff's inability to secure coal was an unforeseeable cause of

delay within the meaning of article 5 of the contract. Notwithstanding this action on the part of the contracting officer and the Chief of Engineers the Comptroller General refused to allow payment of said sum of $2,822.46. As the contract specifically provided that "The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final," the action of the Comptroller General was unauthorized, there being no question of good faith involved. *Yale & Towne Mfg. Co.* v. *United States*, 58 C. Cls. 633; *Penn Bridge Co.* v. *United States*, 59 C. Cls. 892; *Empire Engineering Co.* v. *United States*, *Id.* 904; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 67 L. Ed. 286.

We may add that this item (4), as well as items (1), (2), and (3), are not contested in defendant's brief. The real controversy involves item (5), $35,896.26, for ledge rock excavation.

Plaintiff contends that it was compelled to remove ledge rock which was not required by the terms of the contract. Defendant contends that the contractor was not directed to remove ledge rock but was required to remove only the overburden, or overlying material, as specified in the contract. The pertinent provisions of the specifications upon which plaintiff bid are set forth in Finding IX. They notified the contractor of the test probings made by defendant, how they were made, and that "the material encountered above the proposed grade of the bottom was soft mud, firm mud, clay, hard sand, and gravel. Rock was encountered, generally below grade, in some of the probings." Also that—

"The material to be removed is believed to be as stated above, but bidders are expected to examine the work and decide for themselves as to its character, as the United States does not guarantee that the results of these test probings represent the exact character of all the material that will be encountered during the progress of the work."

The specifications required—

"* * * removal and disposition of all material encountered, except ledge rock. The removal of ledge rock, if found, will not be required; such work, if necessary, will be

made the subject of separate contracts. Material to be classified as ledge rock must be of such composition as, in the opinion of the contracting officer, shall require blasting for its removal and shall not include fragments of rock or boulders capable of being raised by the dredge in one piece.

"Should ledge rock be encountered, the contractor shall remove therefrom all such overlying materials as, in the judgment of the contracting officer, can be removed by the use of the plant specified in the accepted proposal, or the equivalent of such plant."

It will be seen from the above excerpt from the specifications that plaintiff was required to remove all of the material encountered except ledge rock; that ledge rock must be of such composition as in the opinion of the contracting officer shall require blasting for its removal, and shall not include fragments of rock or boulders capable of being raised by the dredge in one piece; and further, that should ledge rock be encountered plaintiff was required to remove therefrom all such overlying materials as, in the judgment of the contracting officer, could be removed by the use of the plant specified.

Plaintiff pursued the work of dredging for about a year without trouble, when in October, 1920, it claimed to have encountered ledge rock. No diver was sent down to examine and determine whether it was ledge rock. Plaintiff did not resort to blasting to remove the alleged ledge rock. Whatever rock was removed was removed by dredges. Plaintiff's two witnesses, Nortman and Walthauser, testified that they were ordered by the Government engineers to dredge ledge rock. This was denied by defendant's witnesses, five in number, consisting of the contracting officer Ladue, Chief Engineer Shuman, Engineer in Charge Flynn, Inspector Hubbard, and Inspector Nook, who testified that the orders given to plaintiff were to continue dredging and remove the "overburden," which is defined by the engineers to be such overlying loose material as is found upon a layer of rock at the bottom of a stream.

This, no doubt, is what is referred to in the specifications as "overlying materials." We are more impressed with the

testimony of these five witnesses than we are with the testimony of plaintiff's witnesses. Their positive testimony is that orders were not given to dredge the ledge rock, but to continue to remove the overburden. They are borne out and corroborated by the fact that for three months after plaintiff complained of the ledge rock its dredges continued to bring up mud, sand, gravel, and other overlying materials. All of the rock which plaintiff claims to be ledge rock, with the possible exception of less than a dozen large pieces, plaintiff carried away to a dumping ground through a twenty-inch suction pipe. It is no doubt true that plaintiff's dredge encountered and broke off some projections or pinnacles of ledge rock. This, however, was incidental to the main operation, due probably to the irregular contour of the underlying ledge. To what extent rock was broken from the ledge by the plaintiff's dredge, or whether the large pieces were overlying material shaled or detached from the ledge prior to plantiff's contract, the evidence does not disclose.

The rock in question was certainly not ledge rock under the definition of the specifications, which did not include as ledge rock fragments of rock or boulders capable of being raised by the dredge in one piece. Blasting was not resorted to. Furthermore, the rock in question was not ledge rock in the opinion of the contracting officer to whom was left the decision as to whether the overlying materials could be removed by the use of the plant specified in the accepted proposal. (Finding IX.)

Judgment should be awarded in the sum of $18,191.34. It is so ordered.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

FERDINAND H. PLACK AND JOHN F. DEAL, COPARTNERS, TRADING UNDER THE FIRM NAME AND STYLE OF ENTERPRISE WIRE & IRON WORKS, v. THE UNITED STATES

[No. E-487. Decided February 4, 1929]

On the Proofs

Contract for construction work; delays; extension of time; work subsequently required.—A provision in a contract that where any delays in the prosecution or completion of the work are caused by the Government the contractor may have an extension of time if claim therefor is presented within a specified time, applies to the work called for by the original contract, and such claim in the absence of other agreement is not necessary as to work subsequently required.

Same; change in specifications; additional work; acceptance of orders and price; damages due to additional time.—Where the original contract makes no provision for a change in specifications or additions to the amount of work, the acceptance of orders for such changes or additions together with the price named therein constitutes a new and supplemental contract, and furnishes the contractor no ground for damages due to the necessity of more time or a different period of the year than that required by the original contract.

The Reporter's statement of the case:

Mr. E. C. Brandenburg for the plaintiffs. *Mr. Louis M. Denit* and *Brandenburg & Brandenburg* were on the brief.

Mr. Heber H. Rice, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Ferdinand H. Plack and John F. Deal were, during all of the times hereinafter mentioned, copartners trading under the firm name and style of the Enterprise Wire & Iron Works, with their office and principal place of business in the city of Baltimore, in the State of Maryland.

II. On the 25th day of June, 1923, plaintiffs, under the firm name of the Enterprise Wire & Iron Works, entered into a formal contract with the United States, represented by

General Frank T. Hines, Director of the United States Veterans' Bureau, by the terms of which plaintiffs obligated themselves to provide all materials and furnish all labor necessary to perform the work of installation, erection, and completion of certain window, door, stair, and roof grilles, roof, awning, etc., at the U. S. Veterans' Hospital, No. 81, Bronx, New York City, according to certain specifications and drawings made a part of the contract and attached thereto. The consideration for said contract was the sum of $18,500, and the work of performance was to be completed within one hundred (100) working days from the date of receipt of notice of execution of the contract.

Among other things the contract provided that for any delays caused by the Government extensions of time would be allowed, "which extended period shall be determined and fixed by the Director [of the Veterans' Bureau]; but no such allowance shall be made unless a claim therefor is presented in writing to the Director within forty-eight hours of the occurrence of such delay," and that $25.00 per day was to be deducted or collected from plaintiffs by the Government as liquidated damages, and not as a penalty, for each day of delay in completing the work beyond the time fixed or extended under the contract.

III. The contract in question was entered into in response to an advertisement for bids. Under date of June 19, 1923, plaintiffs were notified by letter that their bid had been accepted and approved by the Director of the United States Veterans' Bureau, and were directed to take no action for the execution of the work until such time as they were advised to do so by the Veterans' Bureau. Under date of June 19, 1923, copies of the contract and bond covering the performance of the work were sent to plaintiffs, and they were requested to execute the same. Under date of July 25, 1923, plaintiffs were sent a copy of the executed contract covering the work and directed and authorized to proceed with the work at the earliest practicable date. Under date of July 28, 1923, plaintiffs wrote to the representatives of the Veterans' Bureau requesting that copies of the plans and specifications covering the work be sent them at once, in

order that the measurements might be secured and drawings prepared and submitted for approval. Plaintiffs received one set of drawings covering the work on August 4, 1923, and immediately sent their representatives to the site of the hospital for the purpose of taking measurements, and upon their return a representative visited the Veterans' Bureau at Washington for the purpose of securing further details necessary in the preparation of the drawings. On August 14, 1923, plaintiffs transmitted to the Veterans' Bureau detailed drawings for approval, and at the same time suggested that certain minor changes be made in the plans and specifications to correct certain defects therein, and to make a better and more durable construction. Plaintiffs thereafter made numerous requests that the approval of the drawings be expedited, but they received no advice from the Veterans' Bureau in reference to the suggested changes in the plans and specifications until September 24, 1923, when the Director of the Veterans' Bureau, Frank T. Hines, sent plaintiffs a letter stating in substance that approval was granted for all changes listed in plaintiffs' letter; also ordering seventy additional grilles, to cost $1,100, and requesting that the fabrication thereof be expedited in order that the work might be installed at the earliest possible moment. The letter bears date of September 17, but it was not transmitted to plaintiffs until September 24. This letter stated that it was in reply to plaintiffs' letter of Aug. 30th, referred to hereinafter in Finding VI.

IV. Immediately upon receipt of advice that the drawings had been approved plaintiffs began the fabrication of the grilles. The fabrication was completed and the grilles were delivered to the site on December 3, 1923, at which time plaintiffs began construction work.

V. Under date of September 11, 1923, and before plaintiffs had been advised that the drawings suggested by them had been approved, they were sent a letter signed by A. P. Chronquest, medical officer, stating in substance that attention was called to certain openings for which window guards were to be installed, and that the lack of protection had been

giving the hospital administration concern. It was consequently suggested that the grilles covering these openings be fabricated " at the first available opportunity."

On September 26, 1923, plaintiffs advised defendant that they had been unable earlier to make reply because of the failure of the defendant theretofore to approve the drawings.

Under date of October 1, 1923, Stratton, chief of design subdivision, wrote plaintiffs calling their attention to the letter dated September 11th from the medical officer and requested that they give the installation of these particular grilles priority.

On October 10, 1923, these grilles were shipped to the construction site. The fabrication of these grilles out of their order prevented the orderly prosecution of the fabrication of the grilles called for by the original contract and caused some delay in the performance thereof. It does not appear from the evidence just how many days plaintiffs were delayed by reason of being required to fabricate these particular grilles out of order.

VI. The original contract called for three hundred fifty-three (353) grilles. Under date of August 16, 1923, A. P. Chronquest, surgeon and medical officer in charge, sent plaintiffs a letter stating in substance that plaintiffs were requested to submit an addenda to their original proposal for the installation of certain additional grilles not included in the contract and a grille partition.

Under date of August 30, 1923, plaintiffs replied to defendant's letter dated August 16, 1923, their letter being addressed to the Director of the Veterans' Bureau. In plaintiffs' letter a reference was made to a conference had in the office of the director and a number of changes in the contract were suggested on the ground that they would afford better and more durable construction and a saving in cost, and a proposal was submitted to install 70 more grilles for $1,100.00 if the changes were accepted.

The statement of these changes indicated that if the work was performed in accordance with the original specifications in certain respects it would be neither satisfactory nor dur-

able. To this letter defendant replied in the letter sent September 24th, referred to in Finding III, accepting the proposal.

VII. Under date of January 22, 1924, the Director of the Veterans' Bureau executed and sent to plaintiffs Change Order A, changing and increasing the work to be performed and increasing the contract price the sum of $1,000.00. Change Order A provided that there should be no change in the time of completion as provided in the original contract. This change order is a duplicate of the order given in the letter sent September 24, referred to in the preceding finding and Finding III.

Under date of January 31, 1924, the Director of the Veterans' Bureau sent Change Order B to plaintiffs, which order provided for some additional work and increased the contract price $200.00, but did not extend the time of completion.

Under the original specifications the awnings on the roof were designed to roll and required certain winding devices. This was found to be impracticable owing to the height of the roof and the danger of the fastenings breaking and the canvas tearing or being blown off by the wind. Because of this impracticability the defendant on March 21, 1924, issued Change Order C, which provided that there should be furnished and installed awnings of 12-ounce duck laced to pipe frames reinforced to provide strength. This change order was transmitted to plaintiffs on March 25, 1924, and the work thereon was not finally completed until June 11, 1924.

Under date of May 12, 1924, Change Order D was sent to plaintiffs. This order provided for the omission of guard doors on the north and south roofs of building No. 3, and the contract price was decreased by the sum of $25.00.

After the roof structure had been erected it was found that additional bracing was advisable and on May 20, 1924, the defendant issued Change Order E requiring plaintiffs to supply and install a 2″ x 2″ angle iron entirely around the three sides of the south roof of building No. 3 connecting the same to the ends of T arms projecting inward 2′ 6″ from

the uprights, thereby forming a support for the grille panel placed in the projecting space and affording additional bracing. To make this change after the order was received by plaintiffs took from seven to ten days, time being saved by purchasing the material in New York and fabricating it on the job. This change increased the work to be performed and the contract price was increased in the sum of $60.00.

All of the change orders except Change Order D, which decreased the work, provided that there would be no change in the time of completion of the contract. Plaintiffs accepted all of the change orders and performed the additional work required thereunder. It required from thirty-five (35) to forty-five (45) days to fabricate and erect the seventy (70) additional grilles required by Change Order A. It required three weeks' time to perform the work under Change Order B. It required sixty-seven (67) days to perform the work required under Change Order C. Change Order D decreased the work, but it does not appear from the evidence how much time was saved by the omission of the guard doors as provided for in Change Order D. It required seven (7) days to perform the work provided for by Change Order E.

VIII. Plaintiffs fabricated all of the grilles provided for in the original contract and in the change orders, and erected the same in accordance with the approved plans and specifications. After approximately one hundred and twenty-five (125) grilles had been erected it was found that the sills of the building were out of level and were not squared with the brick sides of the window opening, so that the grilles instead of sitting upon the high point of the sill were at the bottom. One end would be from 1 to 1½ inches higher than the other. This was objectionable to the officer in charge, and in order to remedy the defect plaintiffs were directed by the defendant to raise the grilles off the sill by placing bronze blocks under them. This required the removing of one bolt and putting in a larger bolt. The work of making these changes was extremely hazardous. The only way the bronze block could be put on was to swing a man out on a chair and have another man raise him with a

block and fall. It required forty (40) days for plaintiffs to make these changes.

IX. The original contract and the change orders provided for four hundred and twenty-three (423) grilles. The hospital building in which these grilles were installed was six stories in height, located on a high bluff overlooking the Harlem River, about three hundred and fifty (350) feet above tidewater, and exposed from all sides to the weather. The work consisted of drilling six holes into the brick 2½ to 3 inches deep for each grille. It had to be done from the outside of the building with the men being supported or standing on the window sill. Each grille weighed six hundred (600) pounds.

X. Under the original contract the work should have been completed on or before December 6, 1923. The last change order was issued under date of May 20, 1924. Due to the delays in having the suggested changes in the plans and specifications approved plaintiffs were unable to begin work until December 3, 1923. This extended the work into the winter months of 1923–24. The greater part of the time during the winter months the weather was good for outdoor work, but at times low temperature and snow and sleet hindered the work. Due to the cold weather, and due to the fact that the work of putting on the grilles was extremely hazardous, plaintiffs were unable to secure an adequate force of men. There were days when men refused to work on the building. It does not appear from the evidence how many days plaintiffs were delayed by reason of the weather conditions.

The contract was not completed until July 7, 1924, or two hundred and fourteen (214) days after the same should have been completed under the original contract.

Plaintiffs could have erected these grilles in the summer or other than the winter for the sum of $2,640, but as they had to be erected in the winter, the efficiency of the men was impaired, and they were unable to work continuously on account of the cold, snow, and sleet, with the result that it actually cost the plaintiffs to erect the said grilles the sum

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of $6,047.01, which resulted in a loss to the plaintiff of $3,407.01.

XI. Due to the delay in the completion of the work plaintiffs were required to maintain their organization and keep men on the job two hundred and fourteen (214) days in excess of the period covered by the contract. The overhead for this period of time was $2,942.50. Plaintiffs incurred an extra expense of $107.20 for the transportation of men from Baltimore to New York to work on the job. Some delay was caused by the plaintiffs, the extent of which is not shown by the evidence, except that it appears that it was comparatively slight and unimportant.

XII. Plaintiffs never, at any time, applied for an extension of time in which to complete the contract because of delays.

XIII. Including the changes the contract price for the work was $19,835. Contractors have been paid the sum of $16,920, leaving a balance of $2,915 due under the contract for the work performed. Subsequent to the completion of the work contractors submitted a voucher for $2,915 as the unpaid balance of the contract price. Under date of October 7, 1924, the Veterans' Bureau informed the contractors that the unpaid balance of the contract price would be withheld against the amounts deducted as liquidated damages, and stated that there was a balance due the Government of $1,147.50. This was in pursuance of a letter sent by the Director of the Veterans' Bureau to plaintiffs in which he presented a statement of account according to which there was a balance due the plaintiffs on work of $2,915, and there was due the Government as liquidated damages for 162½ days at $25 a day $4,062.50, leaving a balance due the Government of $1,147.50. The letter also requested that the remaining $1,147.50 be promptly remitted to the Government.

Plaintiffs refused to remit the sum of $1,147.50, and submitted a claim for the sum of $2,915 as balance due under the contract, to the General Accounting Office, which claim on review was disallowed by the General Accounting Office and a balance of $1,660 was certified due the United States.

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The court decided that plaintiffs were entitled to recover $2,915.00.

GREEN, *Judge*, delivered the opinion of the court:

The findings show that the plaintiffs entered into a contract with the defendant on June 25, 1923, to furnish certain materials and do certain work, of which the greater part consisted of the fabrication and installation of certain grilles or window guards at a Government hospital; and subsequently, at the request of defendant, furnished other material and performed certain other work for and on the same hospital. Including the changes, the contract price for the work was $19,835. Plaintiffs completed the work 214 days after the time limit in the contract and were paid the sum of $16,920, which is $2,915 less than the contract price. When plaintiffs demanded the payment of the unpaid balance, the Veterans' Bureau informed them that this unpaid balance would be withheld as a part of liquidated damages due from plaintiffs by reason of delay in the completion of the work, and stated that there was a balance due the Government of $1,147.50.

Plaintiffs now bring this suit to recover the unpaid balance of $2,915, together with $3,407.01 for extra cost of labor made by the increase and changes in the work, $107.20 for expense incurred for transportation, and $2,942.50 for additional overhead, all due, as plaintiffs claim, by reason of changes in the original specifications and additional work ordered by defendant.

Defendant bases its claim for liquidated damages upon alleged delays on the part of plaintiffs in the preparation for and completion of the work, but the evidence shows that the delays were almost entirely caused by the acts of the defendant. On July 25, 1923, plaintiffs were sent a copy of the executed contract and authorized to proceed with the work, but at that time the defendant had furnished no plans or specificaions. No plans were received until August 4, 1923, and these having been found to be defective, on August 14 plaintiffs submitted to the Veterans' Bureau detailed drawings for approval with suggestions for changes

to correct these defects and make a better and more durable construction. The Veterans' Bureau delayed replying to this communication until September 24, when a letter was sent agreeing to the changes and ordering 70 additional grilles. From time to time after the plans and drawings were received, the defendant made changes in the specifications, ordered a large amount of additional work done, some of it being grilles for different openings than those provided for by the original contract, and even after 125 grilles had been erected plaintiffs were directed by defendant to make changes in the manner of attaching the grilles which could only be done by extremely hazardous work. Under the original contract, the work should have been completed on or before December 6, 1923. The last change order was issued under date of May 20, 1924, and owing to the delays caused by changes in the plans and specifications, plaintiffs were unable to begin installing the grilles until December 3, 1923. This extended the work into the winter months of 1923 and 1924. The cold weather and hazardous nature of the work prevented plaintiffs from obtaining an adequate force of men, and there were days when men refused to work on the building.

The extent of the delay caused by some of these changes and requirements of additional work is shown in the findings, but there are some matters for which the defendant was responsible as to which the evidence does not show the amount of delay, although it was substantial.

Practically all the delay was caused by defendant. We labor under the same difficulty as the court did in the case of *Snare & Triest Co.* v. *United States*, 55 C. Cls. 386, 395, in which the court said, in substance, that it was unable to understand upon what theory the plaintiff was chargeable with liquidated damages for delay in completing work that was not even included in the original contract. Nor is it material that some delay was caused by the plaintiffs even if it had been considerable, as it was not. In *United States* v. *United Engineering Co.*, 234 U. S. 236, 242, where the Government sought to recover liquidated damages, it was said:

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"* * *, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time, and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract can not be insisted upon, and liquidated damages measured thereby are waived."

The courts have uniformly held that where each party to a contract is responsible for delays in its performance, the court will not undertake to apportion the delays and will deny a recovery for liquidated damages. See *Caldwell & Drake* v. *Schmulbach*, 175 Fed. 429, and cases cited therein; *N. Y. Cont. Jewell Filtration Co.* v. *United States*, 55 C. Cls. 288.

It will be observed that a number of the changes were made after the expiration of the time for completing the contract. It is urged by defendant that the special orders which directed the changes all provided that the work "involves no change in the time of completion as provided by the contract," but this provision is meaningless as applied to work not contracted for until after the expiration of the time limit of the original contract. We do not need to speculate as to how or why this provision came to be in the orders. Taken literally, the language is simply absurd and unintelligible as applied to the situation. If given any force and effect the contractor would be liable for liquidated damages no matter how promptly he performed the work.

The defendant also relies on the provision of the contract that where any delays "in the prosecution or completion of the work" were caused by the Government, extension of time would be allowed, which "period shall be determined and fixed by the Director; but no such allowance shall be made unless a claim therefor is presented in writing to the Director within forty-eight hours of the occurrence of such delay." But this provision was made with reference to the work provided for by the original contract and plaintiffs did not make any such agreement with reference to the altogether different work which they were subsequently directed to undertake. The "work" referred to in the contract can be only that which is specified therein.

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It is quite evident that the defendant is not entitled to recover on its claim for liquidated damages, and that plaintiffs are entitled to recover the amount withheld by the defendant by reason of this claim.

The questions arising on plaintiffs' claim for extra cost resulting from being compelled to do the work in the wintertime and for overhead depend on altogether different principles from those relating to the claim of the defendant for liquidated damages. There is no doubt that plaintiffs sustained a loss by reason of being obliged to do this work in the wintertime, but the fact that plaintiffs sustained a loss does not of itself and alone entitle them to recover therefor. They must go further and show by the evidence that their loss was a result of some breach on the part of the defendant of the provisions of the contract, either express or implied, and also show the amount of damage resulting from such breach.

The greater part of the delay in completing the contract was caused by orders transmitted by defendant for additional work. These orders were in writing and specified the additional work or changes to be made and stated the price which the defendant would pay therefor. The acceptance of each of these orders constituted a new and supplemental contract between the parties. Plaintiffs were not obliged to perform this work under the original contract, which made no provisions for change in the specifications or additions to the amount of work; nor could they, as we think, after having agreed to perform this work for a certain sum, demand a higher price by way of damages or otherwise in the absence of any breach of the supplemental contract on the part of the defendant. It should be noted also that the amount of this new work was such that at the date when it was accepted, plaintiffs knew, or should have known, that it would prolong their contract operations into the winter, and of the difficulties and delays that would result therefrom.

One of the most important contracts for additional work was made on a proposal from plaintiffs. It originated from a request made by the defendant in a letter of August 16, 1923, that plaintiffs would submit a proposal for the installation of certain additional grilles not included in the

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original contract and a grille partition. To this letter plaintiffs replied on August 30, 1923, submitting a proposal to install 70 more grilles for $1,100.00 if certain changes from the original contract were accepted. These changes not only made for a more durable construction, but they also made a saving in cost and were, therefore, to the advantage of plaintiffs. In a letter sent September 24th, the defendant accepted plaintiff's proposal so that plaintiff could have commenced the fabrication of the grilles at that time. Apparently, a duplicate order for this work was made through a change order dated January 22, 1924. Why this duplication occurred does not appear from the evidence, but there is no showing that it delayed the work. None of the so-called "Change Orders A, B, C, and D" were sent to plaintiffs until 1924, and the last one was sent May 20, 1924. All of these "change orders" specified the price at which the additional work was to be done, and plaintiffs, by the acceptance thereof, agreed thereto. The effect of these contracts for additional work and "change orders" was to abrogate the time limit for the completion of the contract; but when plaintiffs entered into new contracts to do work at a specified price which required more time, then, so far as the work covered by these contracts is concerned, it gave plaintiffs no ground for demanding damages.

There were some changes ordered by defendant requiring work which the plaintiffs had neither proposed nor agreed to do. For example, after plaintiffs had erected about 125 grilles in accordance with the contract, it was found that by reason of defective construction of the windows the grilles did not fit satisfactorily. As a result, some rather difficult changes were ordered by defendant which required dangerous work and took forty days for the completion thereof. If there was any evidence as to how much this forty days' work cost the plaintiffs, we think plaintiffs would be entitled to recover the cost thereof, but there is no evidence even of the number of men employed and the only testimony offered by plaintiffs is with reference to the extra cost incurred by reason of being compelled to do the work in the winter. It is clear that the plaintiffs ought not to be required to pay all

of this cost, but we have no way of apportioning the amount of expense caused by this or any other change by itself. The same principle applies to the claim of $2,942.50 for additional overhead and the claim of $107.20 for extra expense incurred in transportation of workmen.

It follows that plaintiffs are entitled to recover the amount withheld by defendant as liquidated damages and that the other claims made in the petition should be denied. Judgment will be rendered accordingly.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

ALFRED J. SWEET (INC.) v. THE UNITED STATES

[No. H–325. Decided February 4, 1929]

On the Proofs

Income tax; return of corporation; deductions; contributions for religious, charitable, etc., purposes; "ordinary and necessary expenses."—Contributions for religious, charitable, etc., purposes are not deductible under the income-tax laws in the returns of corporations, nor are such deductions allowable under the guise of "ordinary and necessary expenses," although the corporation was benefited by such contributions. See also *Consolidated Gas Co.* v. *United States*, 65 C. Cls. 252.

The Reporter's statement of the case:

Mr. Clyde L. Rogers for the plaintiff. *Mr. Manton M. Wyvell* was on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Maine, with its principal place of business at Auburn, Maine, and is engaged in the manufacture and sale of shoes.

During and prior to the year 1921 plaintiff's predecessor was a corporation existing under the laws of the State of Delaware under the name of Lunn & Sweet Company. In the year 1923 the said corporation was reorganized under the laws of the State of Maine under the name of Lunn & Sweet (Inc.). This corporation assumed all the assets and liabilities of its predecessor, the Lunn & Sweet Company, and continued in business until the year 1925, when it was reorganized under the laws of the State of Maine as McLaughlin-Sweet (Inc.). This corporation assumed all the assets and liabilities of its predecessor, and in January, 1927, changed its corporate name to Alfred J. Sweet (Inc.).

II. Auburn, Maine, is a town of about 18,000 inhabitants situated opposite Lewiston, a town of approximately 35,000 population, on the Androscoggin River. These two towns form one community and are known as the "Twin Cities." The shoe factories of Auburn, the manufacturing of shoes being the chief industry of that city, furnish employment to from 6,000 to 6,500 persons. Until 1921 Auburn had no community recreational center.

III. The plaintiff employed in its factory about 1,200 persons. Of that number approximately sixty-five per cent were male and thirty-five per cent were female. That same ratio has existed since the year 1921. Prior to 1921 the plaintiff was subjected to a large labor turnover among its employees, and particularly among its junior executives, of which there were from fifty to sixty. This same condition existed in all of the factories in Auburn and Lewiston during the period of the World War and until 1921. During the years 1920 and 1921 the labor unrest in Auburn and Lewiston was in part due to the operation of a labor organization that came to Auburn and enrolled a large number of factory employees. Its activities were chiefly among the factory hands as distinguished from the executives and junior executives. A strike was called in one of the factories and there existed a general feeling of uneasiness and unrest in all of the factories in the two cities. The need of a recreational center was recognized, and it was the consensus of the opinion of the business men of Auburn that a Y. M. C. A.

would best solve the problem. In 1921 a campaign for funds for the construction of a Y. M. C. A. by popular subscription was initiated through the Auburn Chamber of Commerce. Alfred J. Sweet, president of the plaintiff corporation, who with the members of his immediate family owned 20,000 of the 22,500 shares of the common stock of the plaintiff corporation, was the chairman of the so-called initial gifts committee and was the active chairman of the campaign in connection with the raising of funds.

IV. At a time prior to 1921 the plaintiff corporation had purchased a tract of land adjoining its factory with the intention of erecting thereon a recreation hall for its employees. However, before the construction of this hall was begun the movement for the erection of a community Y. M. C. A. in Auburn was started by the chamber of commerce, and the plaintiff abandoned its own plans in favor of a community Y. M. C. A.

V. The campaign for funds was successful and as a result the general Y. M. C. A. for Auburn and Lewiston was built. The cost of the project was approximately $275,000. The industries of Auburn contributed approximately fifty per cent of that amount, the industries of Lewiston ten per cent, and the remaining forty per cent was obtained through miscellaneous subscriptions. The plaintiff corporation subscribed $22,500.

VI. The Y. M. C. A. at Auburn has all of the characteristics of a general Y. M. C. A., including a gymnasium, swimming pool, bowling alleys, pool and billiard rooms, social rooms, and has dormitory facilities for from eighty to eighty-five persons. It was dedicated in 1922, and for six months thereafter was a member of the National Council of Y. M. C. A. but later severed its connection with that organization. Its membership is derived from residents of both Lewiston and Auburn. It is nonsectarian and any male person of good moral character of eighteen years of age or over is eligible to a full voting membership in the association upon payment of the membership fee as fixed by the by-laws. It is not self-supporting; the annual cost of operation and maintenance is approximately $40,000.

There is usually an annual deficit of the sum of $16,000. Approximately fifty per cent of that annual deficit is taken care of by the industries of Auburn, and the remaining fifty per cent is taken care of by public subscription.

Irrespective of membership the Y. M. C. A. supervises and encourages competitive baseball and basketball teams between the employees of the several industries of the community, and its gymnasium is available for their games and their practice. During the winter months lectures on vital topics are given in the Y. M. C. A. auditorium. Technical courses on phases of the shoe industry are also given. Facilities of the Y. M. C. A. are made available to the employees of the several factories in turn for their so-called "factory nights" upon which occasions the employees present such entertainments as they may desire. No charge is made by the Y. M. C. A. for the use of its facilities on that night, and the factories themselves bear the cost of whatever refreshments are served.

VII. Since 1921 the plaintiff's labor difficulties have decreased. The employees' absence on account of intoxication has become less frequent and there has been a pronounced decrease in the labor turnover, particularly among the junior executives, and a general and pronounced improvement of morale among the employees of the factories has been obvious. The plaintiff corporation had formerly followed the practice of bringing its junior executives to Auburn from other places, but in recent years has adopted the policy of recruiting, educating, and training its junior-executives from the native population of the community.

VIII. There is located at Lewiston a Y. W. C. A. which devotes its attention to community playground and community-service work at Lewiston and at Auburn. There is also located at Lewiston the Maine Central Hospital, which is a nonsectarian institution available to the residents of Lewiston and Auburn. No special consideration is given to the plaintiff's employees at that hospital, but many receive treatment there. These employees pay personally for such treatment as they may receive. The hospital is not

self-supporting, and the annual deficits are made up by local contributions.

The Androscoggin County Y. M. C. A. operates in communities where there is no local Y. M. C. A. or cooperates with local organizations along special lines, such as summer camps, athletic games, and exhibitions.

During the fiscal year ending November 30, 1921, the plaintiff's predecessor, Lunn & Sweet Company, paid in $16,875 on its subscription to the Y. M. C. A. It contributed $500 to the Y. W. C. A. at Lewiston, $200 to the Androscoggin County Y. M. C. A., and $2,500 to the Maine Central Hospital at Lewiston. It was the policy of the plaintiff corporation to contribute to practically all civic projects and charities of Auburn.

IX. The plaintiff's predecessor, Lunn & Sweet Company, duly filed its income and excess-profits return for the fiscal year ended 1921, and paid the tax disclosed therein. On January 6, 1925, the Commissioner of Internal Revenue assessed against Lunn & Sweet (Inc.) an additional tax of $22,023.72, which sum, plus interest of $4,895, was paid by plaintiff's predecessor, McLaughlin-Sweet (Inc.), under protest on July 23, 1926. The said additional tax of $22,023.72 included the tax on the contributions referred to in Finding VIII hereof.

X. In arriving at its taxable net income reported in its return for the fiscal year ended November 30, 1921, the Lunn & Sweet Company deducted from gross income as ordinary and necessary business expense the amount of its contributions made during the year as set forth in Finding VIII hereof. These deductions were disallowed by the Commissioner of Internal Revenue by letter addressed to plaintiff under date of April 1, 1926. Claim for refund filed by plaintiff November 16, 1926, in the sum of $22,023.72 was rejected by the Commissioner of Internal Revenue February 7, 1927.

XI. It has been stipulated by counsel that—

"(A) If the court should find that the amounts paid by plaintiffs to the Auburn Y. M. C. A. and the Central Maine Hospital were proper deductions from net income for the

year 1921, the amount refundable to plaintiff is $9,142.48 and interest.

"(B) If the court should find that the amounts paid by plaintiffs in the year 1921 to the Auburn Y. M. C. A. was a proper deduction from net income, but the amount paid to the Central Maine Hospital was not a proper deduction, the amount refundable to plaintiff is $7,992.48 and interest."

The court decided that plaintiff was not entitled to recover.

Moss, *Judge*, delivered the opinion of the court:

Plaintiff's predecessor, Lunn & Sweet Company, a corporation existing under the laws of the State of Delaware, filed its income and excess-profits tax return for the fiscal year ending November 30, 1921, in which it claimed as deductions from gross income the following contributions: To the Y. M. C. A., $16,875; to the Y. W. C. A. at Lewiston, Maine, $500; to the Androscoggin County Y. M. C. A., $200; and to the Maine Central Hospital at Lewiston, Maine, $2,500. These deductions were claimed as ordinary and necessary business expenses. An additional tax was assessed by the Commissioner of Internal Revenue covering the total amount of said contributions, to wit: $22,023.72, which additional tax was paid under protest. A claim for the refund of said amount was duly filed and was rejected. This action is for the recovery of same. In 1923 said Lunn & Sweet Company was reorganized under the name of Lunn & Sweet (Inc.), which latter corporation was reorganized in 1925, under the name of McLaughlin-Sweet (Inc.), and in January, 1927, it changed its corporate name to Alfred J. Sweet (Inc.), plaintiff in this suit.

It is provided by section 234 (a) of the revenue act of 1921, 42 Stat. 254, "That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered * * *."

The same provision had been carried into the earlier acts.

It is plaintiff's contention that the contributions in question fall within the meaning of the term "ordinary and necessary expenses."

It will be observed that under the act of 1921, as well as the act of 1918, Congress provided for deductions by *individuals* for contributions or gifts of the nature and character of the contributions made by plaintiff in this case. See section 214 (a) of the act of 1921, subparagraph 11, 42 Stat. 241, and section 214 (a) of the act of 1918, subparagraph 11, 40 Stat. 1068. However, Congress has never extended this deduction to corporations. On the contrary, it has expressly refused to do so. When the revenue act of 1918 was under consideration in the Lower House of Congress, an amendment was offered providing for the deduction by corporations of gifts or contributions similar to the rights granted to individuals. This amendment was the subject of active discussion on the floor of the House and on a vote was defeated. Congressional Record (House), volume 56, part 10, pages 10426-7-8; September 17, 1918. In the light of this specific action there can be no doubt as to the intention of Congress on the subject in controversy. In the case of *Consolidated Gas, Electric Light & Power Company of Baltimore* v. *United States*, decided in this court on April 2, 1928, 65 C. Cls. 252, involving the identical question presented in this case, the court, in an opinion by Chief Justice Campbell, said:

"But it was not an ordinary expense nor was it a necessary one. The amount was what the corporation thought proper to subscribe, and whether to be subscribed at all, was a voluntary act.

" * * * It is sufficient for this case to say that Congress has authorized certain deductions and the court can not extend the terms they have employed. * * *."

Conceding that plaintiff company was benefited by the construction and maintenance of the institutions for which the contributions were made, it was merely an indirect benefit such as would be enjoyed by the general public in that community. However, praiseworthy the act of plaintiff com-

pany in its contributions, Congress has not authorized their deduction from the gross income of corporations, but on the contrary has specifically declined to do so.

Taxing statutes may not be extended by implication beyond the clear import of the language used. *Gould* v. *Gould*, 245 U. S. 151; *United States* v. *Merriam*, 263 U. S. 179.

Plaintiff is not entitled to recover and the petition will be dismissed.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

DAMPSKIBSSELSKABET NORDEN v. THE UNITED STATES

[No. D-409. Decided February 4, 1929]

On the Proofs

Charter party; full complement of men; ability to proceed; delay due to fault of ship.—Where notwithstanding its lack of the full complement of men required by the charter party on ship's delivery a vessel, on notice by the charterer to sail, proceeded to the Roads and instead of continuing the voyage, as it could have done, there waited for the additional men, the loss of time was not due to a deficiency of men which prevented "the working of or the continuance on the voyage of the vessel," but was incurred through "fault of the ship," and the charterer is entitled to damages accordingly, the measure thereof being the rate of hire for the actual period of detention.

The Reporter's statement of the case:

Mr. John M. Woolsey for the plaintiff. *Messrs. Charles R. Hickox* and *Clement C. Rinehart*, and *Kirlin, Woolsey, Campbell, Hickox & Keating* were on the briefs.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. W. Clifton Stone* was on the brief.

The court made special findings of fact, as follows:

I. At all times during the year 1918 plaintiff was, and it still is, a corporation duly organized and existing under and pursuant to the laws of the Kingdom of Denmark.

II. Citizens of the United States are accorded by the Government of the Kingdom of Denmark the right to prosecute against said Government in its courts.

III. At all times during the year 1918 plaintiff was, and it still is, the owner of the Danish steamer *Norden*. The steamer has a total deadweight capacity of about 4,717 tons on Lloyd's summer freeboard.

IV. On April 22, 1918, a contract of charter party was made between plaintiff and the United States, represented by the United States Shipping Board, whereby the plaintiff agreed to let and the United States agreed to hire plaintiff's steamer *Norden* from time of delivery for one round trip between ports on the east coast of the United States and ports on the east coast of South America. The rate of hire fixed by the charter party was 35 shillings, British sterling, per ton on steamers' total deadweight capacity on summer marks, per calendar month.

V. On or about July 23, 1918, a further contract of charter party was made between plaintiff and the United States, represented by the United States Shipping Board, whereby plaintiff agreed to let and the United States agreed to hire plaintiff's steamship *Norden* for about six weeks from the time steamer was redelivered under the charter dated April 22, 1918, the charter to be " for direct continuation " with " no interruption of time between the two charters." The rate of hire stipulated was the same as provided in the charter of April 22. Copy of the second charter party is annexed to the petition, marked " Exhibit A" and made part hereof by reference.

VI. The terms of the two charter parties were substantially identical except as to the periods of time involved.

VII. The period of service under the charter of April 22, 1918, terminated, and the period of service under the charter party of July 23, 1918, began at 6 p. m. on the 3d of August, 1918, at Boston, Mass.

VIII. The period of service under the charter party of July 23, 1918, ended at 8 p. m. on the 6th of September, 1918, at New York City.

IX. The United States has paid to the plaintiff full hire for the period of service under the charter party of the 23d of July, 1918, from 6 p. m. on the 3d of August, 1918, to 8 p. m. on the 6th of September, 1918, except the sum of $1,271.99.

X. On the 25th of September, 1918, plaintiff's agents presented to defendant's agents a statement of hire then remaining due from the defendant together with an adjustment with respect to coal. The amount of this statement was $5,766.95. The defendant paid on account $4,062.05 and claimed offsets amounting to $1,704.90. The defendant then for the first time claimed to be entitled to offset $1,271.99 of that sum as representing hire from 7 p. m. August 3d, 1918, to 3.45 p. m. August 4, 1918, $1,235.81, together with 3 tons of coal, $36.18.

XI. The United States made the said deduction of $1,271.99 on the claim that said period of twenty and three-quarter hours between 7 p. m. on the 3d of August and 3.45 p. m. on the 4th of August had been lost through fault of the ship, after the ship was ready for sea and the hour of sailing fixed and that by the charter party charterer was relieved from payment of hire for such time.

XII. When the *Norden* arrived at Boston from her previous voyage a number of the crew, having completed their service, left the ship. Diligent efforts were made to fill the vacancies thus created.

A full crew with the exception of two firemen and one donkey man had been obtained by 6 p. m. on the 3d of August, 1918. The vessel could have proceeded without those men to Norfolk, whither it was bound.

The United States Shipping Board gave notice requiring the *Norden* to sail from Boston on the 3d of August, 1918, at 7 p. m., and the ship then proceeded to the Roads.

The vessel remained at the Roads until the 4th of August, 1918, at 3.45 p. m., because she was waiting for the additional members of the crew. They came aboard at the Roads and

the vessel sailed in ballast at 3.45 p. m. on the 4th of August, with its full complement of officers and crew. The delay in final sailing was not ordered or required by the charterer.

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

The defendant hired by charter the ship of the plaintiff for a voyage between ports in the United States and South America, paying for its use on a per diem basis. After the expiration of the charter, and in final settlement with the plaintiff the defendant claimed and made a deduction for loss of time amounting to 20¾ hours.

A brief statement of the facts may help to clarify the issue. The delay for which the deduction was made took place between 7 p. m. on August 3, 1918, and 3.45 p. m. on August 4, 1918, and the reason for the delay stipulated and found in the facts was because " the vessel did not have a full complement of officers and crew."

The charter provided for " direct continuation " of a previous charter with " no interruption of time between the two charters." The charter required the plaintiff, among other things, to have on ship's delivery, ready to receive cargo, a " full complement of officers, seamen, engineers, and firemen for a vessel of her tonnage and to be so maintained during the continuance of this charter party."

The vessel arrived in Boston on its previous voyage at some date prior to August 3, 1918, passed under the control of the defendant at 6 p. m. on said date and was given orders by the defendant to sail at 7 p. m., same date.

During the period between this latter time and the date of arrival a number of the crew had left the vessel, and at the time fixed for sailing the crew was short, that is, there was a deficiency of two firemen and a donkey man. At 7 p. m. the ship was towed out to the roadstead and anchored, and there it remained until 3.45 p. m. the next day, or 20¾ hours, awaiting the arrival on board of the two firemen and the

donkey man, when the ship sailed for the port of Norfolk, Va., where presumably it was to take on its cargo. In any event this was its destination when it set out. For this delay the Government made the deduction. As stated, the findings show that the reason for the delay was because the ship did not have a full complement of officers and crew.

Who ordered this delay does not directly appear, but, as the ship was under the control of the plaintiff's officer and had been directed by the defendant to sail at 7 p. m., it must be presumed that it was due to the action of this officer and representative of the plaintiff. Section 17 of the charter provides:

"That in the event of loss of time from deficiency of men * * * which prevents the working of or the continuance on the voyage of the vessel for twenty-four consecutive hours or more, the payment of hire shall cease from the commencement of the loss of time till she again resume actual service for charterers * * *."

And further:

"Also, if any loss of time is incurred through fault of ship, after cargo and coals are on board, or cargo discharged and ship ready for sea as far as charterers are concerned and hour of sailing has been fixed by charterers and reasonable notice given to captain, such lost time is to be for steamer's account."

It is plain from the first of these provisions that it was intended to apply to such a deficiency of men as operated to either prevent the working of the vessel or the continuance of its voyage for twenty-four consecutive hours or more, which would seem to indicate that where this deficiency had directly operated to prevent the "continuance of the voyage" the plaintiff should have twenty-four hours in which to remedy the situation.

However, as the findings show, this was not the situation here, as the vessel could have proceeded to Norfolk without the two firemen and the donkey man. The deficiency was not such as to prevent the continuance of the voyage, and plaintiff, therefore, was not entitled to twenty-four hours

within which to delay the continuance of the voyage and make up the deficiency without being liable for loss of time.

As the first part of section 17 does not apply, the defendant's case rests upon the application of the second part of the clause above quoted, which provides for a right of deduction for time lost through "fault of the ship," which is assumed to mean either from the faulty condition of the ship or its equipment or through the action of those in control of its operation. The delay here was not due to the condition of the ship, and it must have been due, therefore, to the action of those who had control of the operation of the ship, and consequently "through fault of the ship," that is, the representative of the plaintiff.

This being true, the plaintiff can not recover, as the provision for plaintiff's right to delay to supply the "deficiency" does not apply under the conditions just stated.

Two other questions have been raised in the case by the defendant, viz, (1) that it has not been shown that a citizen of the United States was, at the time this action was brought, accorded a right to sue in the courts of Denmark, of which country plaintiff was a citizen, and (2) if the claim was one covered by the Suits in Admiralty Act, whether the two-year limitation of that act would apply. In view of the conclusion reached, it is not necessary to decide either of these questions. We are inclined, however, to the opinion that the first objection is not well taken.

The measure of loss to the defendant of the 20¾ hours is the rate of hire named in the contract, and this was the basis of the deduction made by the Government and which made up the sum for the recovery of which this suit was brought.

The petition should be dismissed, and it is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

ARTHUR E. COLGATE, ADMINISTRATOR OF THE ESTATE OF CLINTON G. COLGATE, DECEASED, v. THE UNITED STATES

[No. H-188. Decided February 4, 1929]

On the Proofs

Special jurisdictional act; patent; res adjudicata; abandonment of application.—The special jurisdictional act of March 3, 1927, requires a rendition of judgment as to legal liability on facts heretofore reported to Congress, and validity of a patent involved therein is not res adjudicata where the judgment of another court affirming the validity did not rest upon proof of abandonment which was thereafter reported to Congress by the Court of Claims.

Same; statutes applicable.—The special jurisdictional act of March 3, 1927, requires the application of the statutory law in force and in existence at the time the controversy arose and continued.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the briefs.

Mr. Henry C. Workman, with whom was *Mr. Assistant Attorney General Herman J. Galloway,* for the defendant.

The court made special findings of fact, as follows:

I. On January 31, 1848, the patentee, Simpson, filed in the Patent Office an application for a patent for "conducting electricity through water." In this application Simpson described his invention as follows:

The conducting wire was—

"first insulated with insoluble india rubber or gutta-percha; the insulated wire is then covered with glass beads (B) socketed together so as to form a close joint * * *; an insoluble india-rubber tube (D) is then drawn over the glass-bead chain, jointed, cemented, and banded together (E) so as to be both water and air tight. The object of this arrangement or combination is to guard against and prevent the water from coming in direct contact with the telegraphic

wire, thus securing the entire control of this mysterious agent. This combination secures the object so desired."

He claimed the invention as follows:

"Now, what I claim by my invention and desire to secure by letters patent is the combination and arrangement of the gums and glass around the telegraphic wire in such form as to secure the controlling power of the mysterious agent, 'electricity,' as hereinbefore described."

Subsequently and in support of said application Simpson filed in the Patent Office a second specification "as being more explicit than the first one and as supplying the former deficiency and as embracing the whole principle of his plan for which he had asked a patent." No patent was ever issued upon this application.

II. On April 2, 1849, Simpson filed another application for a patent entitled "mode of insulating telegraph wires" in the specification of which he stated that the nature of his invention was shielding the wire from contact with any and all conducting matter—

"by covering it with india rubber, glass beads, and gutta-percha, either together or separate."

Also—

"The gutta-percha must be softened by any of the well-known processes, and when in a malleable or plastic state I spread it in any desired thickness around the wire; this operation when well and carefully done is sufficient of itself without any other coating to insulate the wire and for all ordinary practical purposes."

Also "for further security and to guard against rough usage" he specified that the wire was also covered with a coating of india rubber and with a series of glass beads, and over the beads he placed a coat of gutta-percha.

No drawing or specimen accompanied the application, but these were filed June 16, 1849, upon requisition therefor. In this application the invention claimed was—

"the application of gutta-percha as a covering or shield for wire to insulate it for electromagnetic telegraphs and also the application of india rubber, glass beads, and gutta-percha, together in the manner and for the purpose herein-before described.

"I do not claim the application of glass beads alone as a covering to insulate electromagnetic wires, that having been in use before my discovery. I do not claim the application of India rubber or metallic rubber alone as a covering to insulate electromagnetic wires, that having been in use before my discovery."

This application was rejected on the ground that the invention was not found new. On January 15, 1851, Simpson wrote the Commissioner of Patents relating to this application as follows:

"I herewith withdraw my application for a patent for a mode of insulating telegraph wires, now in your office, and request that $20 may be refunded to me in gold, agreeable to an act of Congress in such case made and provided."

III. December 24, 1858, Simpson filed another application for patent for "a new and improved submarine telegraph cable." The invention claimed was the combination of gutta-percha and metallic wire in such form as to encase a wire or wires or other conductors of electricity within the nonconducting substance gutta-percha.

This application was rejected on the ground that insulating electrodes with gutta-percha was well known and that the journals of France, England, and this country for several years had fully treated the subject and also on the ground that the alleged invention was abandoned to the public.

Simpson appealed from this rejection to the board of committee of appeals, but said rejection was confirmed by said committee.

IV. October 8, 1859, Simpson filed another application for patent for "submarine telegraph cable," the same in subject matter as the preceding, together with certain affidavits and exhibits in support of his claim to a patent. This application was rejected on grounds similar to those in the preceding application. Simpson again appealed to the board, who again reached their former conclusion. On May 9, 1860, the commissioner confirmed the board's decision and refused to grant a patent. Simpson then appealed to the United States Circuit Court for the District of Columbia, which overruled

the appeal and confirmed the action of the Commissioner of Patents.

V. On May 4, 1866, Simpson filed another application for a patent. The specification and claim of this application were similar to those contained in the application mentioned in Finding IV. Upon this application on May 21, 1867, a patent No. 65019, and the one in controversy in this case, was issued to Simpson. The validity of this patent was sustained in the following cases: *Colgate* v. *Western Union Telegraph Co.*, 15 Blatch. 365; *Colgate* v. *Gold & Stock Telegraph Co.*, 16 Blatch. 503. The opinion in the above case of *Colgate* v. *Western Union Telegraph Co.* gives what was then considered by the court a complete history of the invention in question and is referred to for information upon that subject.

VI. May 12, 1848, one John J. Craven, of Newark, N. J., filed an application for patent entitled "Mode of preparing wire for electromagnetic purposes," and his claim of invention was substantially the same as the several claims of Simpson heretofore stated.

The application of gutta-percha to coating wires was disclosed in numerous printed publications and foreign patents, among which are the following:

British patent to Cooke, No. 9645, of 1842, which described a coating of india rubber as a means of insulation for telegraph wires, enrolled September 8, 1843.

British patent to Nickels, No. 10897, of 1845, which discloses the covering of wire piano strings with gutta-percha, enrolled April 27, 1846.

British patent to Brett, et al., No. 11576, of 1847, which discloses the electrical insulation of metal with caoutchouc and "the substance known as vulcanized india rubber," enrolled August 11, 1847.

British patent to Reid, No. 11974, of 1847, enrolled May 23, 1848, which discloses the covering of electrical wires with gutta-percha for insulation. The third claim of this patent disclaims the use of gutta-percha for the "mere coating or covering of said electro-telegraphic wires."

British patent to Barlow, et al., No. 12136, of 1848, enrolled October 27, 1848, which discloses improvements in the

"means of covering and thus protecting insulating wires of telegraphs when gutta-percha is used as the material or part of the material for covering such wires."

British patent to Henley, et al., No. 12236, of 1848, enrolled February 10, 1849, which discloses an "improved compound of gutta-percha suitable for the insulation covering and exterior protection of wire and other metallic substances employed to transmit currents of electricity."

It also appears that prior to the first application of Simpson for a patent for this alleged invention the matter of the insulation of telegraph wires by means of gutta-percha and other substances for several years had been the subject of much discussion in the scientific journals of Europe and particularly of Germany.

The date of enrollment of the British patents above given is the date when specifications were filed and made public.

VII. The title in the Simpson patent was in Arthur M. Eastman from March 29, 1871, until September 3, 1877, when it passed under his will to his wife, Elizabeth H. Eastman, who, on November 15, 1877, individually and as executrix, transferred the patent to Clinton G. Colgate. This transfer of title to Colgate was a voluntary assignment and not by operation of law.

VIII. After the validity of the Simpson patent had been sustained in litigation with the Western Union Telegraph Co., as reported in that case, as before stated in Fifteenth Blatchford, 365, said telegraph company entered into an agreement with the plaintiff therein whereby the sum of $100,000 was paid for all past infringements and a schedule of license fees was established for the future, and similar agreements were made with other parties desiring to use the patented invention.

IX. The United States Government has by its Signal Service and Weather Bureau used submarine cables consisting of metallic wires employed as conductors of electricity encased with gutta-percha as an insulating agent between 1873 and 1883, and by applying the rates fixed in the schedules named in the last finding the claimant would have been entitled to the sum of $50,000 for such use.

X. Considerable evidence was produced in this court relating to the priority of the invention of the device in question by said Simpson which was not before the courts in the cases heretofore mentioned, where such invention was sustained.

XI. The law in force at the time of Simpson's applications for patents was the patent act of 1836. (5 Stat. 117.) Section 7 of said act reads, in part, as follows:

"*And be it further enacted*, That on the filing of any such application, description, and specification, and the payment of the duty hereinafter provided, the commissioner shall make, or cause to be made, an examination of the alleged new invention or discovery; and if, on any such examination, it shall not appear to the commissioner that the same * * * had been patented or described in any printed publication in this or any foreign country * * * it shall be his duty to issue a patent therefor."

Also the patent act of 1839 (5 Stat. 353). Section 6 of that act is as follows:

"SEC. 6. *And be it further enacted*, That no person shall be debarred from receiving a patent for any invention or discovery, as provided in the act approved on the fourth day of July, one thousand eight hundred and thirty-six, to which this is additional, by reason of the same having been patented in a foreign country more than six months prior to his application: *Provided*, That the same shall not have been introduced into public and common use in the United States prior to the application for such patent: *And provided also*, That in all cases every such patent shall be limited to the term of fourteen years from the date of publication of such foreign letters patent."

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This case is governed by a special jurisdictional act approved March 3, 1927, which reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the findings of fact made by the Court of Claims in the case of Arthur E. Colgate, administrator of the estate of Clinton G. Colgate, deceased, against the United States, congressional, numbered 6063, Senate Document Numbered 703,

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Sixty-fourth Congress, second session, be, and they are hereby, referred back to the Court of Claims with jurisdiction to render judgment as the findings of fact heretofore found and the law require: *Provided*, That either party hereto may appeal to the Supreme Court of the United States upon or from any conclusion of law or judgment, from which appeals now lie in other cases, at any time within ninety days after the rendition of judgment: *Provided further*, That the amount of any such judgment shall not exceed the sum of $50,000: *And provided further*, That such notice hereof shall be given to the Attorney General of the United States as may be provided by orders of said court, and it shall be the duty of the Attorney General to cause one of his assistants to appear and defend for the United States."

The case was before the court in 1916 upon a congressional reference, and findings of fact were made and transmitted to Congress on December 4, 1916.[1] The special jurisdictional act expressly limits the adjudication of the case to the findings heretofore made by the court and leaves for final consideration by the court the single issue of law applicable thereto. The case itself is one of ancient origin and *sui generis* in many of its aspects. Simpson, the original patentee, filed his first application for a patent January 31, 1848. The application embraced but one claim and that, as appears from Finding I, was for a "combination and arrangement of the gums and glass around telegraphic wire in such form as to secure the controlling power of the mysterious agent 'electricity.'" In April, 1849, the applicant filed a new application, going more into detail and especially amplifying his invention. The applications were rejected by the Patent Office, and on January 15, 1851, the applicant wrote the letter set out at the close of Finding II. Almost eight years later, on December 24, 1858, the inventor filed another application containing without important modifications a claim for his original invention. This application was rejected on the ground of public knowledge of the alleged invention and abandonment of the same. From the order rejecting this application the applicant unsuccessfully appealed to the board of committee of appeals. On

[1] 52 C. Cls. 543.

October 8, 1859, another application was filed, containing the same subject matter, and again it met with a rejection order, predicated upon the same ground as the preceding rejection. The applicant again appealed, resulting in a confirmation of the order of rejection. The applicant then appealed to the United States Circuit Court for the District of Columbia, receiving finally a decision adverse to his contentions. On May 4, 1866, another application was filed covering again the same subject matter, and as a close to the proceedings the application was allowed and letters patent issued to the inventor on May 21, 1867. The findings disclose the subject matter of the invention; no issue arises with respect thereto.

The jurisdictional act uses these words, "to the Court of Claims with jurisdiction to render judgment as the findings of fact heretofore found and the law require." Both the plaintiff and the defendant seem to be in accord with the construction of the statute, that the law applicable to the case is the statutory law in force and in existence at the time the controversy arose and continued. We think the parties are correct in this respect. Congress was fully apprised as to the facts. The existing doubt as to liability arose upon a legal point, and the plaintiff was afforded a forum and opportunity to present his contentions as to the legal liability of the defendant, and the defendant granted equal rights with respect to any available defenses.

The plaintiff insists that the validity of the patent has been repeatedly established in courts of competent jurisdiction and that this issue is *res adjudicata.*

The original assignee of the patent, Colgate, commenced a suit in equity against the Western Union Telegraph Company to enjoin infringement of the patent herein involved in the United States Circuit Court for the Southern District of New York. (15 Blatch. 365.) Then Circuit Judge Blatchford on November 26, 1878, delivered the opinion of the court. In the opinion, a very exhaustive one, the court covered and disposed of every defense now raised by the defendant, lack of novelty, anticipation, abandonment, and alleged illegality of procedure in the Patent Office. An injunction was granted and an accounting decreed. Subse-

quently the defendant paid the plaintiff $100,000 in satisfaction of past infringement and for a license for future use.

The above case, subsequently followed by additional litigation involving Simpson's patent, would, of course, in the usual course of judicial procedure, determine the issue as to validity. See also *Colgate* v. *Western Union Telegraph Co.*, 19 Fed. 828; *Colgate* v. *Gold & Stock Telegraph Co.* (Federal cases #2991); *United States* v. *Colgate*, 21 Fed. 318; *United States* v. *Colgate*, 32 Fed. 624; *Colgate* v. *International Ocean Telegraph Co.* (Federal cases #2993); *Colgate* v. *Compagnie Francaise du Telegraphe de Paris a New York*, 23 Fed. 82.

The jurisdictional act is positive in expression and devolves upon the court the necessity of adjudicating the case upon the findings made in 1916. The findings reported to the Senate in 1916 followed from a quite voluminous record, including, of course, the documents recited therein, and were not excepted to by either party subsequent to their announcement, so that they did reflect to the satisfaction of the parties the facts of the case from the record made up during the course of the trial of the same. The court, in view of this situation, has no alternative except to take the case and adjudicate it upon the existing findings and the applicable law. The court would have little trouble in doing so were it not for the defendant's insistence upon the issue of abandonment. This, we think, is the determinative point in the case. Circuit Judge Blatchford disposed of this particular contention and predicated his conclusions upon a letter written by the inventor to the Commissioner of Patents on January 13, 1851. This letter the court reproduces, as follows:

"Please pay to the order of George B. Simpson, claimant, for insulation of telegraph wire, twenty dollars balance of patent fee to be refunded on rejection of claim."

In response to a defense rested upon abandonment of application, predicated upon the foregoing letter, the court said:

"His specification of 1849 is fairly to be considered, for the purposes of this suit, as an amendment of his two specifications of 1848, and the application of January, 1848, is to be regarded as an application completed in 1849, in such wise

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that the application made in January, 1848, is to be regarded as a continuous application, rejected in October, 1849. By the statute, as it stood at the latter date, the applicant, on the rejection of his application for want of novelty, which was the ground of such rejection of Simpson's application, had placed before him two alternatives. One was to elect to withdraw his application, whereupon, on filing a notice, in writing, of such election, he would be entitled to receive back $20. The other was to persist in his claim for a patent, whereupon, on filing a new oath, he could take an appeal. If he did not file a notice of his election to withdraw his application, he was to be regarded as persisting in his claim for a patent. In the present case, Simpson did not file any notice of his election to withdraw his application, or any notice that he withdrew his application. He asked for the $20, without withdrawing his application, and, although the office was not authorized to pay him back the $20 unless he withdrew his application, it did so. The office may have regarded the request for the $20 as equivalent to a withdrawal of the application, but the statute is distinct, and a request to be paid 'twenty dollars balance of patent fee, to be refunded on rejection of claim,' can not be construed as a withdrawal of the application, even though the $20 was refunded and accepted. The statute is plain, and the applicant may have intentionally refrained from withdrawing his application, while, if the office had informed him that the $20 would not be refunded unless he first filed a withdrawal of his application, he might have refused to file such withdrawal, lest it might prejudice his rights. He left all the papers in the Patent Office. According to his own statement, he had refunded to Day the $20 fourteen months before he received it back from the Patent Office. Therefore, when he asked the office for the $20, it must have been solely because of his need of money. There is no act or declaration of his, in connection with the refunding of the $20, that can be construed into an abandonment of his application or of his invention."

Manifestly the court did not have before it Simpson's letter of January 15, 1851, set forth at the end of Finding II, in which the inventor unequivocally withdraws his application. The letter was in existence and available to the defendant. As a matter of fact, the complainant's counsel stated to the defendant's counsel upon the hearing that he had found this identical letter in the Patent Office and brought it to his attention. The failure of the defendant to incorporate it in the record is commented upon by the court

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in the case of *Colgate* v. *Western Union Telegraph Co.*, 19 Fed. 828, as follows:

"Whether it was assumed by defendant's counsel that the fact was not of sufficient importance to be incorporated into the proofs, or whether they supposed it would be treated by the court as a conceded fact, is not material, in view of the decision and opinion of the court rendered within a few days after the hearing, by which it was plainly indicated that the fact was a material one and was not in the proofs."

The patent statute of 1836 states in part as follows:

"In every such case, if the applicant shall elect to withdraw his application, relinquishing his claim to the model, he shall be entitled to receive back $20, part of the duty required by this act, on filing a notice in writing of such election in the Patent Office, a copy of which, certified by the commissioner, shall be a sufficient warrant to the Treasurer for paying back to the said applicant the said sum of twenty dollars. But if the applicant in such case shall persist in his claim for a patent, with or without any alteration of his specifications, he shall be required to make oath or affirmation anew, in manner as aforesaid."

The opinion of the court is obviously sound in holding that the refund of the patent fee to Simpson in pursuance of the letter of January 13, 1851, was not in accord with the statute. However, it is to be especially noted that the refund of the fee was not made by the Patent Office until, as recited in Judge Blatchford's opinion, January 21, 1851, six days after the letter of January 15, 1851, a document which unquestionably met the requirements of the act of 1836 concerning refunds. The inference, we think, is irresistible that the commissioner refused a refund under the letter of January 13, 1851, and exacted the letter of January 15, 1851, two days later, prior to the payment of the refund on January 21, 1851. The fact is indisputable that the letter of January 15, 1851, was not before Judge Blatchford, and was not incorporated in the record in the first case of *Colgate* v. *Western Union Telegraph Co.* This is fully confirmed by the proceedings for a rehearing, denied by the court in *Colgate* v. *Western Union Telegraph Co.*, 19 Fed. 828 (*supra*).

To cite numerous authorities upon the effect of the withdrawal of an application for patent and a failure to file a new

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one for a period of nearly eight years, wherein during the interim the invention has become known and gone into public use, is a useless proceeding. Suffice it to say that a careful examination of the cases in the briefs discloses no single instance wherein it has not been held that a proceeding akin to the instant case has not been held fatal to the patentee upon the ground of abandonment. Prior to 1861 the patent statutes fixed no specific limitation for the prosecution of applications for patents, and the issue of abandonment was uniformly determined upon general principles, taking into consideration the diligence of the applicant and the rights of the public, and Judge Blatchford's discussion of the lack of evidence of any affirmative abandonment upon the part of Simpson, due to his distressing poverty and treatment by the Patent Office, is, without the letter of January 15, 1851, unanswerable. To hazard an opinion as to what might have been the result in the first *Western Union case* (Federal cases, #2995), if the letter of January 15, 1851, had been incorporated in the record, is no part of the court's present duty. It is, we think, proper to observe that an insurmountable obstacle to the plaintiff's right to recover herein exists in the letter of January 15, 1851, found by the court and conceded by all parties to be a part of the transaction, and not heretofore made the part of any record adjudicating the validity of Simpson's patent, except as commented on in the motion for a rehearing in the case decided by Judge Wallace in 1884. (19 Fed. 828.)

The court being of the opinion that the jurisdictional act exacts an adjudication of plaintiff's rights under the existing facts, i. e., is it possible for the plaintiff to recover in view of the facts found in 1916, but which were the facts in 1851—if so, render judgment, irrespective of the statute of limitations; if not, decide accordingly—can do nothing else except dismiss the petition.

It has long since been the law, established by precedent in the case of *Schillinger* v. *United States*, 155 U. S. 163, and thereafter followed without exception, "that the United States may specify the cases and contingencies in which the liability of the Government is submitted to the courts for

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judicial determination, and courts may not go beyond the letter of such consent." While there may be some merit in plaintiff's contention of *res adjudicata*, and if the case was in a position to be heard in a court of competent jurisdiction this late day the insistence would be tenable, nevertheless it is our opinion that where Congress has before it all the facts and decisions of the courts respecting the subject matter of a claim against the Government, and determines by a special act to submit the case in its then condition to this court for a judicial determination of liability, the court is without authority to do more than take the case as it finds it and reach a determination in accord with its merits under the present record of facts, especially so when the facts of the case differ materially from the facts appearing in the record involving former adjudications.

The petition will be dismissed. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

LUCKENBACH STEAMSHIP CO. v. THE UNITED STATES[1]

[No. H-383. Decided February 4, 1929]

On the Proofs

Mail pay; transportation of mails between United States and Panama Canal Zone.—The ports in the Panama Canal Zone are not foreign within the meaning of section 4009, Revised Statutes, providing for the compensation allowable for transporting mail between the United States and foreign ports. In the absence of a contract a carrier is entitled, for such services on a United States steamship, prior to the act of July 3, 1926, amending said section, to reasonable compensation only.

Sovereignty; exercise thereof by executive and legislature.—Sovereignty is a political question, and where the executive and legislative branches of a constitutional government have exercised over a territory the right of taxation, the right of eminent domain, and police powers it is a possession of the said government and not foreign territory.

[1] Certiorari granted.

Practice; illegal; long-continued.—Where officers of the Government have pursued a practice long continued, in payments made for services rendered, such practice does not bind the Government if it was clearly never authorized or legal.

Statutes; retroactive effect.—Statutes are not to be given a retroactive effect unless the legislative purpose to do so plainly appears.

The Reporter's statement of the case:

Messrs. George A. King and *George R. Shields* for the plaintiff. *King & King* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is a corporation under the laws of the State of Delaware, with its office and principal place of business in the city of New York, State of New York.

II. The plaintiff owns and operates and for a long time has operated, under United States registry, a number of steamships, with regular sailings to and from ports on the east coast of the United States, via the Panama Canal, from and to ports on the west coast of the United States. It operated such lines and maintained such sailings prior to, during, and since the period December, 1925, to June, 1926, inclusive.

III. Section 1405, Postal Laws and Regulations, edition 1924, with the official note thereto, together with the amendment thereof, effective October 1, 1925, are as set forth in Paragraph VI of the petition, viz.

Section 1405, Postal Laws and Regulations:

"For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel any sum not exceeding the sea postage, on the mail so transported."

This section in the Postal Laws and Regulations, 1924, is a verbatim repetition of Revised Statutes, section 4009. This is followed by the following official note:

"In view of the provisions of the Universal Postal Union Convention the term 'sea postage' has no meaning. United States steamships receive not exceeding the whole of the postage collected on the articles contained in the mails conveyed by said vessels; and foreign vessels are paid any sum not exceeding the rate of postage fixed for a single maritime transit by the Universal Postal Union Convention in force at such time."

Said section 1405 was, prior to the date of the accrual of this claim, amended, effective October 1, 1925, by the addition of paragraph 2, reading so far as material, as follows:

"Section 4009, Revised Statutes of the United States, having provided for the compensation to be allowed for the transportation of mails between the United States and any foreign port by a United States steamship or by a foreign steamship, as any sum not exceeding the sea postage and United States inland postage in the first case, and any sum not exceeding the sea postage in the second case, it is accordingly declared that unless otherwise specially provided the sums to be allowed for the transportation of United States mails on steamships of United States registry shall be eighty (80) cents a pound for mails consisting of letters and post cards, and eight (8) cents a pound for mails consisting of other articles, including parcel post; and for transportation of foreign transit closed mails on steamships of United States registry, twenty-six and three-tenths (26.3) cents a pound (3 francs a kilogram) for mails consisting of letters and post cards, and three and five-tenths (3.5) cents a pound (40 centimes a kilogram) for mails consisting of other articles, including parcel post."

IV. The Postmaster General, acting through the Foreign Mails Department of the Post Office of New York City, had for a period of years and continuously to December 1, 1925, tendered to the plaintiff and the plaintiff had accepted for transportation and transported mails of the United States and foreign mails for the United States consigned to the Port of Colon, Republic of Panama, and to the Canal Zone of the United States over the Isthmus of Panama. For the transportation of all mails so consigned, transported, and delivered the plaintiff was, on the approval of the Postmaster General, paid at the rates prescribed by the Postmaster General for transportation by United States steamships of mails between the United States and a foreign port.

V. During the period December, 1925, to June, 1926, inclusive, there were delivered to United States vessels operated by the plaintiff accepted by it for transportation, and transported and delivered by it large quantities of mails of the United States of various classes for transportation to and delivery at ports at the Panama Canal and/or from ports at the canal to ports in the United States.

VI. The transportation of mails as set forth in Finding V, if properly to be paid for at the rates prescribed by the Postmaster General for the transportation of United States mail on vessels of the United States between ports of the United States and foreign ports, was worth, and the plaintiff should have been allowed and paid therefor, a total of $82,851.62 for the transportation so involved. For said service the Postmaster General prepared and approved invoices or vouchers aggregating the sum stated, but the General Accounting Office, to which the approved accounts were sent for direct settlement, revised the same to aggregate $52,-480.68, or $30,370.94 less than the aggregate sum approved by the Postmaster General, and the plaintiff has received and been paid for the service described only the amount so allowed by the General Accounting Office.

The action of the General Accounting Office in allowing and paying the lesser amount, and not the amount as approved by the Postmaster General, was the result of a conclusion by it that the applicable rate for the transportation of such mails was that applying to ocean transit of United States mail or foreign closed mail between the United States and its possessions which, for the period involved, it was concluded, was to be fixed only by contractual agreement in accordance with law, and, there being no contract covering such service it was held that the plaintiff was entitled only to a reasonable compensation for such service, which the General Accounting Office determined by comparison with compensation being paid under contracts for the transportation of mail between the United States and its insular possessions to be $52,965.41.

VII. Since July 1, 1926, plaintiff has carried mails of the United States, on vessels of United States registry, between

ports of the United States and ports of the Panama Canal Zone for which it has been allowed and paid at the rates prescribed by the Postmaster General for the transportation of mails on United States vessels between the ports of the United States and foreign ports.

Payments after July 1, 1926, at the increased rates prescribed for the transportation of mail between ports of the United States and foreign ports were made pursuant to the provisions of the act of July 3, 1926, 44 Stat. 900, which was construed as not being retroactive.

VIII. If the transportation performed by the plaintiff during the period from December, 1925, to June, 1926, inclusive, as hereinbefore described was properly to be classed as it had been classed before December, 1925, as stated in Finding IV, at the rates prescribed by the Postmaster General for transportation between ports of the United States and a foreign port, there is due plaintiff for the services performed during the period December, 1925, to June, 1926, a balance of $30,370.94.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

This is a suit for the recovery of the sum of $30,370.94 which the plaintiff claims is the difference between the amount certified by the Postmaster General for transportation of various classes of mails of the United States between ports of the United States and the Canal Zone during the period December, 1925, to June, 1926, and the amount allowed and paid by the General Accounting Office for said services. As had been done prior to December 1, 1925, by the Postmaster General, the amount certified for said services was based upon the compensation or rates prescribed by him as being applicable for the transportation of mails by American vessels between the United States and a foreign port.

The General Accounting Office concluded that the rate payable for said services for the period involved was that applying to ocean transit of United States mail or foreign closed mail between the United States and its possessions, which was to be fixed by contractual agreement in accordance

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with law. In the absence of a contract covering such services the General Accounting Office held that the plaintiff was entitled to a reasonable compensation which was determined by comparison with compensation being paid under contracts for transportation of mail between the United States and its insular possessions. This amount is $30,370.94 less than the compensation certified by the Postmaster General.

The sole question presented by the agreed statement of facts in this case is whether for the transportation of mails between ports of the United States and the ports in the Panama Canal Zone during the period December, 1925, to June, 1926, the plaintiff is entitled to be paid at rates applicable to the transportation of mails between the United States and a foreign port.

The authority to pay the rates contended for by the plaintiff is found in section 4009 of the Revised Statutes, which is as follows:

"For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel, any sum not exceeding the sea postage, on the mail so transported."

The question presented for decision is whether or not the ports within the Panama Canal Zone are foreign ports within the meaning of said section 4009 of the Revised Statutes.

Defendant's very comprehensive and able brief refers in detail to the various pertinent acts of Congress, the treaty with Panama relating to the Canal Zone, and the Executive Orders of the President relating thereto, and gives the court a very clear elucidation thereof, of which we are glad to make copious use.

The President of the United States was authorized to acquire for and on behalf of the United States perpetual control of a strip of land extending from the Caribbean Sea to the Pacific Ocean, and the right to use the waters thereon, and to excavate, construct, and *perpetually to maintain*, operate, and protect thereon a canal, and *jurisdiction* over

said strip and the ports at the ends thereof, to make such police and sanitary rules and regulations as shall be necessary to preserve order and the public health thereon, and to establish such judicial tribunals as may be necessary to enforce such rules and regulations, and for that purpose there was created the Isthmian Canal Commission. (Act of June 28, 1902, c. 1302, 32 Stat. 481.)

Pursuant to the above authority a treaty between the United States and the Republic of Panama to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific Oceans was concluded and signed at Washington on the 18th day of November, 1903. This treaty was ratified, and proclaimed by the President of the United States on the 26th day of February, 1904. (Treaties and Acts of Congress Relating to the Panama Canal, 1917.)

The parts of said treaty to be considered in the determination of this controversy are as follows:

"ARTICLE II

"The Republic of Panama grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low-water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low-water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. * * *

"ARTICLE III

"The Republic of Panama grants to the United States all the rights, power, and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory

within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

Subsequent to the ratification of the treaty with the Republic of Panama the President was authorized to take possession of and occupy on behalf of the United States the territory since known as the Canal Zone. (Act of April 28, 1904, c. 1758, 33 Stat. 429.) By section 2 of said act it was provided that until the expiration of the Fifty-eighth Congress, unless provision for the temporary government should sooner be made by the Congress, all military, civil, and judicial powers, as well as the power to make rules and regulations necessary for the government of the Canal Zone, and all rights, powers, and authority granted by the terms of the treaty between the United States and the Republic of Panama should be vested in such person or persons and should be exercised in such manner as the President should direct for the government of said zone, and maintaining and protecting the inhabitants thereon in the free enjoyment of their liberty, property, and religion. Acting under the authority granted in said acts the President in his Executive order of May 9, 1904, stated:

"I have taken possession of and now occupy, on behalf of the United States, the Canal Zone and public land ceded by the Republic of Panama.

* * * * * * *

"If there now be in force within the Canal Zone any franchise granting to any person or persons a privilege to maintain lotteries or hold lottery drawings or other gambling methods and devices of a character forbidden by the laws of the United States, or if the grantee of any such privilege has now the right to sell lottery tickets or similar devices to facilitate the business of the concessionaire, the commission shall enact laws annulling the privileges or concessions and punishing future exercise of the same by imprisonment or fine, or both." (Panama Canal—Executive Orders, 1904–1921, pp. 21, 25.)

Under authority of said Executive order, there was enacted by the Isthmian Canal Commission a code of laws for the government of the Canal Zone. (Laws of Canal Zone, 1904–1914, Annotated 1921; Code of Civil Procedure, Canal Zone, 1907.) Under said statutes and Executive orders the

commission exercised general governmental authority until March 31, 1914, when it ceased to exist and was succeeded by the permanent organization authorized by the Panama Canal act. (Act of August 24, 1912, c. 390, 37 Stat. 560.) By section 2 of the latter act all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the zone and the construction of the canal were ratified and confirmed as valid and binding until Congress should otherwise provide.

At the time the act took effect there was a judicial establishment in the zone which had been set up under Act No. 1 of the Isthmian Canal Commission. By this act the judicial power of the government of the Canal Zone was vested in a supreme court, circuit courts, and municipal courts.

Prior to the passage of the Panama Canal act the government of the Canal Zone was wholly an executive matter. All powers, executive, legislative, and judicial, were vested in the President. He alone, or through those acting by his authority, made, amended, and repealed laws, created and abolished courts, appointed and removed officials, and generally exercised absolute power over the zone. By Executive order of April 2, 1907, the powers of the governor or chief executive of the zone were vested in the chairman of the commission. Upon completion of the canal this order was changed. Congress assumed the legislative power. While many matters were still left to be regulated by the President, by section 2 of the Panama Canal act the power formerly possessed by the President was abrogated. By section 4 of the act the President, when in his judgment the canal should be sufficiently advanced to render further services of the Canal Commission unnecessary, was authorized to discontinue the commission and complete, govern, and operate the canal and govern the Canal Zone, or cause them to be completed, governed, and operated through a governor and such other persons as he might deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. He was authorized to appoint, by and with the advice of the Senate, a governor at a salary

of $10,000 per annum. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the canal and Canal Zone were to be appointed by the President or by his authority, removable at his pleasure, and the compensation of such persons was to be fixed by him or by his authority, until Congress should by law regulate the same. (37 Stat. 561.)

By section 7 of the act, as amended by the act of September 21, 1922 (c. 370, 42 Stat. 1004), the authority of the governor was defined as follows:

"That the Governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this act otherwise provided, all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the Governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law."

Under various provisions of the law now contained in Title 48 of the United States Code, the President is authorized to grant leases of public lands in the zone (section 1308); to make rules and regulations in matters of sanitation, health, and quarantine (section 1310); to make and change rules and regulations for levying, assessing, and collecting ad valorem, excise, license, and franchise taxes (section 1311); to make and enforce rules and regulations for the public roads and highways and for regulating, licensing, and taxing the use and operation of automobiles (section 1312); to make rules and regulations to assert and exercise the police power in connection with breaches of the peace or disorderly, indecent, or immoral conduct within the zone (section 1313); to make regulations for the operation of the canal and the locks and approaches thereto (section 1318); to provide a method for adjustment of claims arising out of personal injuries to employees (section 1320); to make rules and regulations touching the right of persons to enter or remain upon or pass over any part of the Canal Zone (section 1321); to erect, maintain, and operate radio communications, dry docks, repair shops, yards, docks, wharves, etc., and all

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moneys received from such operations shall be subject to the provisions of existing law relating to the deposit of other public funds of the United States (section 1323); to determine what towns shall exist in the Canal Zone and to subdivide said zone into subdivisions to be designated by name or number and to clearly define their boundaries (section 1341).

In the place of the courts created by the President, acting through the commission, Congress created and established courts and defined their jurisdiction. (Act of September 21, 1922, c. 370, section 1, 42 Stat. 1004.) The jurisdiction in admiralty is the same as is now exercised by the United States district judges and the United States district courts, and the practice and procedure in admiralty is the same as in the United States district courts. (Section 8, Panama Canal act, as amended by act of 1922, section 2, 42 Stat. 1005.) The Circuit Court of Appeals of the Fifth Circuit has jurisdiction to review final judgments of the district courts in all cases in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, and in cases in which the value in controversy exceeds $1,000; in felony cases, and in cases in which the jurisdiction of the trial court is in issue. (42 Stat. 1006; *Theoktistou* v. *Panama Railroad Company*, 6 Fed. (2d) 116.) Such appellate jurisdiction is subject to review by the Supreme Court of the United States, as in other cases, and is exercised by the Circuit Court of Appeals in the same manner as in reviewing final judgments of the district courts of the United States. The district judge, district attorney, and the marshal are appointed by the President by and with the advice of the Senate of the United States for a term of four years each, and until their successors are appointed and qualified. (42 Stat. 1006.)

In the various acts of Congress the Canal Zone has been referred to as "Territory of the United States." In the act relating to the liability of common carriers by railroad to their employees, it is provided:

"That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages

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to any person suffering injury while he is employed by such carrier in any of said jurisdictions, * * *." (Act of April 22, 1908, c. 149, section 2, 35 Stat. 65.)

In the act known and referred to as the "White Slave Traffic Act," it is provided "That the term 'Territory' as used in this act, shall include the district of Alaska, the insular possessions of the United States, and the Canal Zone." (Act of June 25, 1910, c. 395, section 7, 36 Stat. 827.) In the act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government thereof, it was enacted:

"That all laws and treaties relating to the extradition of persons accused of crime in force in the United States, * * * and all laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes and such purposes only the Canal Zone shall be considered and treated as an organized Territory of the United States." (Act of August 24, 1912, c. 390, Section 12, 37 Stat. 569; U. S. Code, Title 48, section 1330.)

In the national defense act relating to the number of the National Guard of the United States, it was enacted that "*Provided further*, That the word Territory as used in this act and in all laws relating to the land militia and National Guard shall include and apply to Hawaii, Alaska, Porto Rico, and the Canal Zone, * * *." (Act of June 3, 1916, c. 134, section 62, 39 Stat. 198.) Congress has enacted that in defining terms the words "The United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States. (Act of March 4, 1917, c. 180, 39 Stat. 1193.) In section 1 of Title XIII, General Provisions, of the espionage act, it is enacted that the term "United States" as used in this act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States. (Act of June 15, 1917, c. 30, 40 Stat. 231.) The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof. (Act of October 6,

1917, c. 106, 40 Stat. 412.) The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States. (Act of April 20, 1918, c. 59, 40 Stat. 534.) The term "United States" as used in this act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States. (Act of May 22, 1918, c. 81, 40 Stat. 559.) The term "United States" includes any State, Territory, or District of the United States, the insular possessions, the Canal Zone, and all lands or waters subject to the jurisdiction of the United States. (Act of July 18, 1918, c. 157, 40 Stat. 913.) The provisions of the national prohibition act were made applicable to the Canal Zone. (Act of October 28, 1919, c. 85, section 20, Title III, 41 Stat. 322.) In the act to regulate the entry of aliens into the United States, Congress provided: "That the term 'United States' as used in this act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States." (Act of November 10, 1919, c. 104, section 3, 41 Stat. 354.)

By Executive order of December 5, 1912, the President of the United States by virtue of the authority vested in him by section 3 of the Panama Canal Act of 1912 (37 Stat. 561) declared all land and land under water within the limits of the Canal Zone to be necessary for the construction, etc., of the Panama Canal, and directed the Isthmian Canal Commission to take possession, on behalf of the United States, of all such land and land under water and to extinguish, by agreement when practicable, all claims and titles of adverse claimants to the occupancy thereof. (Panama Canal—Executive Orders 1904–1921, p. 132.) Subsequently, Congress passed an act removing a certain tract or lots of land situated in the town of Cristobal in said Canal Zone, and authorized the Panama Canal Railroad Company to sell, transfer, and convey said lots or tracts of land with all improvements thereon to any person or persons or associations of persons and retain the consideration therefor for its own use. (Act of June 5, 1920, c. 231, 41 Stat. 948.) In the act relating to the landing and operation of submarine cables in the United States it is

provided, that the term "United States" as used in this act includes the Canal Zone, the Philippine Islands, and all territory, continental or insular, subject to the jurisdiction of the United States. (Act of May 27, 1921, c. 12, section 5, 42 Stat. 8.)

The plaintiff's contention that "The Canal Zone is no part of the United States," but that it is "foreign" within the meaning and intent of the laws of the United States, is not supported by the provisions of Articles II and III of the treaty between the United States and the Republic of Panama.

The treaty under which the United States acquired in perpetuity the use, occupation, and control of the Canal Zone, granted to and vested in the United States forever all the rights, power, and authority in and over said strip of land and lands under water which it could possess as the sovereign thereof to the entire exclusion of the exercise of any such sovereign rights, powers, and authority thereover by the Republic of Panama.

A grant, as used in a treaty, comprehends not only those concessions which are made in form but also any concession, warrant, order, or permission to survey, possess, or settle, whether evidenced by writing or parol, or presumed from possession. (*Strother* v. *Lucas*, 12 Pet. 410, 435; *Bryan* v. *Kennett*, 113 U. S. 179, 192.)

A grant in its own nature amounts to an extinguishment of the rights of the grantor, and implies a contract not to reassert those rights. (*State of Illinois* v. *Illinois Central Railroad Company*, 33 Fed. 730–774.)

In all governments of constitutional limitations sovereign power is manifested in three ways: (1) By exercising the right of taxation; (2) by exercising the right of eminent domain; (3) through its police powers. It has been shown that all of these powers have been exercised by the executive and legislative branches of the Federal Government, and the question of whether or not the Canal Zone is a possession of the United States has been definitely determined and the courts are bound by that determination.

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Sovereignty is a political question. In *Jones* v. *United States*, 137 U. S. 212, it is said that the question of "who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." (See also *Pearcy* v. *Stranahan*, 205 U. S. 265, 273.)

The plaintiff also contends that because certain officers of the United States have for a long time considered and treated the Canal Zone as "foreign" that construction should not now be disturbed. In answer to this contention, we think it sufficient to say that the fact that certain officials of the United States have dealt with the Canal Zone on a basis which does not recognize it as a possession of the United States and treat it as anything but a possession of the United States is not conclusive of its status as a territorial possession of the United States. It is true that beginning with the decision in *Downes* v. *Bidwell*, 182 U. S. 244, the Supreme Court has drawn a distinction in the application of the Constitution and Federal statutes between the organized territory of the United States and its possessions, and has in effect held that the Constitution and general statutes may not apply to its "possessions," or that they have a different application to its "possessions" than they have to the "territory of the United States." Consequently, various statutes, the enforcement of which is particularly within the jurisdiction of certain officers, may be so construed as in effect to treat a "possession of the United States" on the basis of "foreign" territory merely because it is neither affirmatively or impliedly included in the particular statute, or statutes may be properly enacted which effectively deal with such possessions on a distinctly different basis from that of the United States or of its territory. It can not be conceded, however, that these circumstances necessarily establish that the Canal Zone is not a possession of the United States, because, as has already been pointed out, Congress has

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enacted various statutes specifically applicable to the Canal Zone and which deal with it as a "possession of the United States."

There can be no question that the Canal Zone was acquired and is held by the United States under a perpetual grant which for all practical purposes conferred upon and vested in the United States all the rights, power, and authority of a sovereign, and that the United States has exercised full sovereign rights over the Canal Zone ever since the strip of land was acquired.

We think that it must be admitted that all doubt as to the character of the title of the United States in and to the Canal Zone has been conclusively removed by the decision of the Supreme Court in the case of *Wilson* v. *Shaw*, 204 U. S. 24, where it was contended that the United States had no power to construct the Panama Canal because the Canal Zone was no part of the territory of the United States. Mr. Justice Brewer, speaking for the court (pp. 32 and 33), said:

"Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the Canal Zone is no part of the territory of the United States, and that, therefore, the Government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, 'grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal.' By Article 3, Panama 'grants to the United States all the rights, power, and authority within the zone mentioned and described in article 2 of this agreement, * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority.'

"Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of the canal. *It is hypercritical to contend that the title of the United States is imperfect*, and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate." (Italics ours.)

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It is clear from what has been before stated that the Canal Zone under the treaty with the Republic of Panama became and is a possession of the United States, which has always exercised and is now exercising all the powers and rights of sovereignty in the Canal Zone as are being exercised in all of the territory or possessions which are under the control and jurisdiction of the United States, and that ever since it was acquired the Canal Zone has been considered and treated by the legislative branch of the Government as a possession of the United States, and that therefore the Postmaster General was not authorized to pay compensation based upon rates applicable to transportation of mails between the United States and a foreign port, under section 4009, *supra*, of the Revised Statutes.

The plaintiff further contends that because the Postmaster General for a long time prior to December 1, 1925, had construed section 4009, Revised Statutes, as giving him authority to pay for the transportation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails between the United States and a foreign port, such construction should not now be disturbed, "especially when so to do would savor of bad faith and a violation of contract rights." We think the answer to this contention is that an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage. (*Pierce* v. *United States*, 1 C. Cls. 270; *The Floyd Acceptances*, 7 Wall. 666.) In the case of *Houghton* v. *Payne*, 194 U. S. 88, it is stated (pp. 99–100) that—

"* * * it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States* v. *Graham*, 110 U. S. 219; *United States* v. *Finnell*, 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute."

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Section 4009 of the Revised Statutes was amended by the act of July 3, 1926. (44 Stat. 900.) Plaintiff contends that the above act, amending section 4009, Revised Statutes, should be construed as a declaratory statute, making clear the meaning of section 4009, Revised Statutes. In other words, that the amendatory act was retroactive. It is well settled that statutes are not to be given a retroactive effect unless the legislative purpose so to do plainly appears. *United States* v. *Magnolia Petroleum Company*, decided February 20, 1928, 276 U. S. 160, wherein the court said:

"Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

Also in *White* v. *United States*, 191 U. S. 545, wherein it is said:

"Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men rather than review and affix new obligations to that which has been done in the past."

We can not accept the explanation that the act of July 3, 1926, *supra*, amending section 4009 of the Revised Statutes, was an elucidation of said section, and not an addition to it, as claimed by plaintiff, but we regard it as a declaration of a new purpose and not the explanation of an old one. Our view is that the amendatory act makes specific provision for the *casus omissus* in said section 4009, Revised Statutes. See *Smietanka* v. *First Trust & Savgs. Bank*, 257 U. S. 602; also *Shwab* v. *Doyle*, 258 U. S. 529.

Prior to July 3, 1926, the compensation for transporting the mail between the United States and its possessions was required to be fixed by contractual agreement. In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for such service, it is evident that the only payment which may be authorized for the services is their

reasonable value. The plaintiff has not seen fit to offer any evidence to prove that the amount allowed and paid by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service. In the absence of proof that the services were worth more than has been paid therefor the plaintiff can not recover the amount claimed in this cause or any other sum.

It is therefore ordered and adjudged that plaintiff's petition be dismissed.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAM G. TOMLINSON v. THE UNITED STATES

[No. H-345. Decided February 4, 1929]

On the Proofs

Navy pay; dependent mother; rental and subsistence allowances; sec. 4, act of June 10, 1922.—The question of dependency of a Navy officer's mother on him for her chief support is one of fact, to be determined by the mother's station in life and other special circumstances. Cf. *Freeland* v. *United States*, 64 C. Cls. 364, and *Haas* v. *United States*, *post*, p. 718.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the briefs.

Mr. M. C. Masterson, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Frank J. Keating* was on the briefs.

The court made special findings of fact, as follows:

I. The plaintiff has been a lieutenant, junior grade, in the United States Navy, from June 7, 1922, to and including June 6, 1925, and a lieutenant thereafter. He claims rental allowance and increased subsistence allowance on account of an alleged dependent mother for the period from March 20, 1923, to the date judgment is rendered in this case.

Reporter's Statement of the Case

II. From March 20, 1923, to December 31, 1927, and thereafter, plaintiff's mother, Madora G. Tomlinson, has been dependent upon him for her chief support by reason of the following circumstances:

Her husband, plaintiff's father, died in December, 1913, and she has ever since remained a widow, being now fifty-nine years of age. Plaintiff is her only child. During the period involved in this claim and prior to August 1, 1926, she lived with her two sisters and two grandchildren at 839 West 59th Street, Kansas City, Missouri, except for the time she lived with plaintiff while he was on shore duty at San Diego, California, and Pensacola, Florida. From said date to the present time she lived with plaintiff in private apartments in Washington, D. C. Her general health was good. She was not engaged in any occupation. Upon the death of her husband in 1913, she received $10,000 on account of life insurance. Also, she then owned a house, which was sold by her about four years later for $8,500. The house was mortgaged in an amount not shown definitely by the evidence, but which was deducted from the proceeds of the sale.

During the time covered by the claim, plaintiff's mother owned or had an undivided interest in real property consisting of three houses, located in Kansas City, Missouri. One of the houses, in which she had a one-third undivided interest, was originally mortgaged for $2,700, but the mortgage was later increased to $4,000. Also, she owned 10 shares of Kansas City Tile & Trust Company stock, par value of which was $100 per share, tangible personal property amounting to $600, and money in the bank, her balance at times being as much as $1,000. She has not been able to rent or sell one of these houses since September, 1926, and the others have not been rented continuously. It does not appear that she received or demanded any rent for another of these, known as 839 West 59th Street, occupied by her sisters, and prior to August 1, 1926, by herself with them. She received a yearly dividend of 6 per cent on her 10 shares of stock until 1927, when she received a yearly dividend of 8 per cent. The total approximate value of all property owned by her does not

exceed $10,000, and produces an income not in excess of $55 a month, reduced somewhat by maintenance charges.

When plaintiff's mother lived in Kansas City with her two sisters and two grandchildren, prior to August 1, 1926, in the house owned jointly by her and her two sisters, the household expenses were shared equally between the three sisters, and her share of the living expenses averaged not less than $200 a month.

Plaintiff and his mother, while living in Washington, occupied apartments for which they first paid a monthly rental of $105, and later $110, and finally $90, and also paid $20 a month for garage. The living expenses of the mother, including one-half of the rent, upkeep of automobile, recreation, and entertainment while in Washington, are approximately $200 a month. Plaintiff has contributed a minimum of $150 a month toward the support of his mother during the time involved.

III. Plaintiff first received rental and subsistence allowances as an officer with dependents, but subsequently all such allowances up to September 30, 1924, were checked against him, the amount of such allowances so checked being $687.64.

If held entitled to additional rental and subsistence allowances because of a dependent for the period October 1, 1924, to December 31, 1927, last available roll on file in the General Accounting Office, there would be due plaintiff the sum of $2,332.20, and thereafter at the rate provided by law for a lieutenant of the Navy.

The court decided that plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This case, like the case of *Haas* v. *United States*, No. H-442, this day decided [*post*, p. 718], turns upon the construction of section 4 of the act of June 10, 1922, 42 Stat. 625, which has so often been set out in the reports of this court as not to need repetition.

Plaintiff was a naval officer of the rank of lieutenant, junior grade, up to June 6, 1925, and thereafter to the present date a lieutenant, and has received certain rental and subsistence allowances as an officer with dependents; but sub-

sequently all allowances up to September 30, 1924, were checked against him, and deducted from his pay. He claims that his mother was "in fact dependent on him for her chief support" within the meaning of the law; that the deduction from his pay was wrongful; and that he is entitled to recover the amount so deducted together with allowances as provided by law thereafter. Plaintiff is the only child of his mother, who is a widow fifty-nine years of age. She owns some property in Kansas City, some of which is productive and some unproductive, besides bank stock to the value of $1,250. Her entire property does not exceed $10,000 in value, and her gross income from her property does not exceed $55 a month or $660 a year.

Plaintiff's mother now lives with him in an apartment in Washington and has done so for the last two years. Her living expenses approximate $200 a month, and plaintiff contributes $150 a month thereto.

The main contention on behalf of the defendant is that while plaintiff's mother owns this property she is not dependent upon him for her chief support; and it seems to be claimed that until this property or its proceeds have been exhausted she is not "in fact dependent." We think the intent of the law is that where the person alleged to be dependent has property which is returning an income, the case should be determined upon the situation in which the alleged dependent is found, considering the income which she receives from the property, and then determining whether the amount necessary and proper for her support above the amount of her receipts is such that she is dependent "for her chief support" upon other sources. This view finds support in the case of *United States* v. *Purdy*, 38 Fed. 902. We would not go so far as to hold, as the court did in that case, that "The mother is entitled to support according to the style in which she has been living," for this style might be needlessly extravagant, but we do think that the mother is entitled to such support as would be reasonable in accordance with her station in life. What amount per month would be necessary in the case before us, we do not feel called upon

to determine further than to say that it is sufficiently large over and above the amount which plaintiff's mother receives from her individual income to make her in fact dependent on the plaintiff for her chief support.

The rule laid down above is not a universal one to be applied in all cases where the alleged dependent has property. Different circumstances might require a different holding, but we think it applicable in the case at bar. Having determined by the findings of fact that the plaintiff's mother is in fact dependent upon him for her chief support, it follows that plaintiff is entitled to recover not only the amount wrongfully deducted from his pay on account of sums previously paid him for rental and subsistence allowances, but also to receive rental and subsistence allowances fixed by law for an officer of his rank with a dependent mother, from October 1, 1924, to the date of entry of judgment herein, which judgment will be entered on receipt from the Accounting Office of a statement of the amount due the plaintiff in accordance with this opinion.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

MORRISDALE LAND CO. v. THE UNITED STATES

[No. H-409. Decided February 4, 1929]

On the Proofs

Capital-stock taxes; "carrying on or doing business."—Plaintiff, whose income was derived from rents and royalties from coal leases, and profits and interest on securities, and which assisted in the coal operations of another company whose stockholders were identical with it, *held* to be "carrying on or doing business" within the meaning of sec. 1000, revenue act of 1921, and sec. 700, revenue act of 1924.

Same; amount of business done.—No particular amount of business is required to bring a party within the terms of the statutes imposing a capital-stock tax on domestic corporations "carrying on or doing business."

The Reporter's statement of the case:

Mr. George E. H. Goodner for the plaintiff. *Mr. George R. Jackson* was on the brief.

Mr. McClure Kelley, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a corporation organized and incorporated in 1914, under the laws of the State of Pennsylvania, with a capital stock of $5,000, for the purpose of "purchasing, holding, leasing, and selling real estate." All of the stock of plaintiff was owned by F. H. Wigton, except three shares, one owned by L. A. Prichard, president, one by R. W. Wigton, secretary and treasurer, and one by F. W. Mensch, for director purposes.

II. Plaintiff had no overhead expense in the conduct of its affairs. Its officers received no salary. They were also officers of the Morrisdale Coal Company, which was owned by said F. H. Wigton, in whose offices plaintiff's business was conducted.

III. At the time of plaintiff's organization it acquired 2,666 acres of coal-right land upon which were improvements consisting of a mine derrick, miners' houses, and other necessary buildings to conduct the operations; 253 acres of these lands were surface rights. Plaintiff acquired said property from F. H. Wigton, to whom it paid $200,000 in its bonds and $5,000 capital stock.

IV. When plaintiff acquired said property there were two outstanding leases thereon to parts of the undeveloped, unimproved coal lands, one on a basis of eight cents and one on a basis of ten cents per ton royalty on coal mined, which were to continue until the coal was exhausted.

V. Shortly after acquiring said property plaintiff leased the balance thereof, together with all the buildings and improvements, described in Finding III, to the Morrisdale Coal Company, owned by said F. H. Wigton, upon a royalty basis of eight cents a ton, the then prevailing rate for undeveloped coal land without improvements.

VI. Plaintiff conducted no mining operations. Its income was derived from the rents and royalties received from said leases and profits on its investments of securities. All expenses of ordinary repairs and taxes were paid by the Morrisdale Coal Company, its lessee. Extraordinary expenses were paid by plaintiff, and when, in the opinion of plaintiff's officers, its income had accumulated to a sufficient amount it was invested in interest-bearing securities, some of which were at times sold and the proceeds reinvested in other securities.

VII. At all times the plaintiff maintained a working capital varying from slightly over $1,000 to something over $9,000. It paid taxes at the rate of about $800 a year, and also paid the insurance on its store building, other insurance being carried by the Morrisdale Coal Company.

It also loaned to the said Morrisdale Coal Company on November 13, 1925, $15,000, and again on May 13, 1926, $4,800, as advances to be used with additional money paid to it by the insurance company to rebuild a store building which had been burned; and borrowed money from the Morrisdale Coal Company at various times prior to July 1, 1921, with which it paid off its bonds.

VIII. No formal meetings were held by plaintiff except at its organization. Plaintiff paid no dividends, nor did it distribute any money to its stockholders during the period of its existence.

IX. Plaintiff rendered to the collector at Philadelphia, Pennsylvania, capital-stock tax returns for the period July 1, 1921, to June 30, 1925, and paid the taxes assessed thereon as follows:

Year ending June 30, 1922	$45.00	paid Nov. 25, 1921.
	111.00	paid Oct. 26, 1922.
Year ending June 30, 1923	170.00	paid July 21, 1922.
Year ending June 30, 1924	173.00	paid July 11, 1923.
Year ending June 30, 1925	160.00	paid Sept. 18, 1924.
Total	659.00	

X. On or about July 29, 1925, plaintiff filed with the collector at Philadelphia, Pennsylvania, a claim duly executed on Treasury Department Form 843, demanding refund of $659.00, the total tax paid for said years, on the ground that

plaintiff was not doing business within the purview of the law, and therefore was not subject to the capital-stock tax, and said claim was rejected by the Commissioner of Internal Revenue by letter dated November 5, 1925.

XI. Plaintiff rendered to the collector at Philadelphia, Pennsylvania, a capital-stock tax return for the year ending June 30, 1926, and paid the tax assessed thereon of $166.00 on May 21, 1926.

XII. On June 21, 1926, plaintiff filed with the collector at Philadelphia, Pennsylvania, a claim duly executed on Treasury Department Form 843 demanding refund of $166.00, the capital-stock tax paid for said year, on the ground that plaintiff was not doing business within the purview of the law, and therefore was not subject to the tax; and said claim was rejected by the Commissioner of Internal Revenue by letter dated August 13, 1926.

XIII. The capital structure of the plaintiff after its $200,000 in bonds was paid off was as follows:

Liabilities

Capital stock	$5,000.00
Paid-in surplus	126,738.10
Total	131,738.10

Assets

Profit and loss account, including $52,281.25 in bonds	$61,346.07
Average real-estate account—building, houses, etc	35,000.00
Approximate value of coal lands	350,000.00
Total	446,346.07

The court decided that plaintiff was not entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

This is a suit to secure the refund of certain capital-stock taxes paid by the plaintiff for the years ending June 30, 1922, 1923, 1924, and 1925. The taxes were assessed and collected upon the theory that during these taxable years the plaintiff was " carrying on or doing business " within the meaning of

Opinion of the Court

section 1000[1] of the revenue act of 1921, 42 Stat. 227, 294, and section 700[1] of the revenue act of 1924, 43 Stat. 325.

One F. H. Wigton, prior to the year 1914, owned 2,666 acres of coal land upon which were a derrick, miners' houses, and other buildings necessary to the conduct of mining operations, and he also owned the Morrisdale Coal Company, a coal operating company. In 1914 the said Wigton organized and had incorporated the plaintiff corporation, under the laws of the State of Pennsylvania, with a capital stock of $5,000, and the declared purpose of "purchasing, holding, leasing, and selling real estate." Immediately after its organization the said Wigton conveyed title to the said coal lands to plaintiff and received therefor in payment $200,000 in its bonds and all of its capital stock of $5,000.

It will be seen, therefore, that the said Wigton, while owning all of the stock of the Morrisdale Coal Company, at the same time owned all of the stock and the bonds of the plaintiff; that is to say, both companies were owned by the same person, and for all practical purposes this person was in each case the company. Immediately after it was incorporated the plaintiff leased to the Morrisdale Coal Company—that is to say, Wigton in effect leased to himself—the coal lands which had been conveyed to the plaintiff, and also continued certain existing leases then held by the Morrisdale Coal Company. The latter conducted a mining business, the plaintiff did not, and it will be readily seen had

[1] Section 1000 of the revenue act of 1921 provides as follows:

(a) On and after July 1, 1922, in lieu of the tax imposed by section 1000 of the revenue act of 1918—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included.

* * * * * * *

(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or, in the case of a foreign corporation, not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231, nor to any insurance company subject to the tax imposed by section 243 or 246.

Section 700 of the revenue act of 1924 is couched in identical terms with the above set-out provision of the revenue act of 1921.

Opinion of the Court

no occasion for doing so, as Wigton was already, through the Morrisdale Coal Company, conducting the coal business.

Wigton, in the management of the two companies, arranged that the plaintiff should get its income from the rents and royalties received from these leases and from its profits and interest on the securities which it held. It arranged that the Morrisdale Coal Company should pay for certain repairs to the buildings and apparatus on the lands, while the plaintiff paid for the greater part of the capital improvements and also taxes on the land, the bookkeeping and distribution of work in each case being arranged, of course, by Wigton, the owner of both companies. The officers of the two companies were the same and were paid as officers of the Morrisdale Coal Company. The plaintiff did not maintain separate offices, but conducted its business, held its meetings and kept its accounts in the offices of the Morrisdale Coal Company.

The plaintiff owned a store building on the premises, and it leased this to another company, the Morrisdale Supply Company, the stock of which was also all owned by Wigton. Advances were made in 1925 and 1926 to the Morrisdale Coal Company by the plaintiff, together with certain insurance money, to enable the Morrisdale Coal Company to rebuild the store building which had been burned down, and the Morrisdale Coal Company on several occasions prior to July, 1921, advanced money to plaintiff in order to enable it to pay off its bonds.

The plaintiff paid no dividends during its existence, but paid off its bonds ($200,000), and built up by 1926 a profit and loss account of over sixty-one thousand dollars, which included over fifty-two thousand dollars in bonds. Plaintiff's capital account showed an average real estate account of $35,000 and coal lands of an estimated value of from $350,000 to $500,000 in 1914, and the only liability on the capital side of the account was the capital stock of $5,000 and $126,738.10 carried as paid-in surplus.

On several occasions the plaintiff sold at a profit some of the bonds which it held for investment and maintained a working capital of from $1,000 to $9,000, and paid taxes each

year on its real estate, amounting to about $800. It paid its capital stock taxes of $659 for the years stated above, namely, June 30, 1922, 1923, 1924, and 1925. Plaintiff for these years tendered to the Government its capital-stock returns, and the tax was assessed according to the returns, and paid. The last payment was made for the year ending June 30, 1925. On or about July 29, 1925, plaintiff filed with the collector at Philadelphia a claim demanding the refund of $659, the total tax paid for these years, on the ground that it was not doing business within the meaning of the statute, and therefore not subject to a capital-stock tax.

It will be seen from the foregoing that the plaintiff and the Morrisdale Coal Company, when their corporate garments are pulled aside, reveal Wigton as the person doing business in each case. He owned both companies; their offices were in the same place; they transferred money from one to the other as might be necessary, and were undoubtedly two parts which made up one operation and one concern. It is perfectly clear that the plaintiff was doing business and assisting in the coal operations of the Morrisdale Coal Company. But, aside from that, were it standing alone and not intimately connected with the operation of the Morrisdale Coal Company, it would be within the meaning of the statute. We hold that it was carrying on and doing business within the meaning of the statute, and was right originally when it rendered its returns each year for capital-stock taxes and paid them.

It is clear that under the provisions of the statute each case must rest upon its own bottom and its own facts. There can be no rule of general application laid down to cover the language of the statute "carrying on and doing business," except that no particular amount of business is required in order to bring a party within the terms of the statute. See *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 517. Compare the following cases: *Chevrolet Motor Co.* v. *United States*, 64 C. Cls. 211 (certiorari denied); *Edgar Estates Corporation* v. *United States*, 65 C. Cls. 415; *Conhaim Holding Co.* v. *Willcuts*, 21 Fed. (2d) 91; *Flint* v. *Stone Tracy*

Co., 220 U. S. 107; *Edwards* v. *Chile Copper Co.*, 270 U. S. 452; and *Harmar Coal Co.* v. *Heiner*, 26 Fed. (2d) 729.

Plaintiff is not entitled to recover and its petition should be dismissed. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

AVERY BRUNDAGE v. THE UNITED STATES

[No. H-18. Decided February 4, 1929]

On the Proofs

Contract for remodeling; use of old material; failure to salvage.—In a contract with the Veterans' Bureau for remodeling and alterations it was provided that plaintiff was to receive certain material to be salvaged from another building for use under the contract, and plaintiff in his bid made allowance for the use of said material. The salvage material, upon being removed by the Government, was damaged and intermingled with other material, and was not made available to the plaintiff, who was compelled to replace it with new material at an increased cost. *Held*, that plaintiff was entitled to recover the extra cost by reason of being compelled to substitute new material.

The Reporter's statement of the case:

Mr. Edward Clifford for the plaintiff. *Mr. B. B. Pettus* was on the brief.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. Plaintiff is a citizen of the United States, resident in the city of Chicago, State of Illinois, and was at the times hereinafter mentioned in the general contracting business at 110 South Dearborn Street, Chicago, Ill.

II. On or about June 13, 1922, the United States Veterans' Bureau advertised for proposals for the remodeling of construction and alterations on the north half of the tenth floor, and the entire eleventh floor of the Butler Building (B) in Chicago, Illinois, for the use of the Veterans' Bureau

Dispensary, and plaintiff received a copy of the specifications thereunder. Said specifications are attached to the petition as Exhibit "A," and are made a part hereof by reference.

III. Said specifications contained the following provisions:

"*Use of old material:* All old material which is removed from the 7th floor of the Leiter Building that is suitable and complies with the requirements of the specifications and drawings shall be reused in the new quarters. All old material used shall be reinstalled in neat and workmanlike manner. New work in connection with the old work (unless otherwise specified or noted on drawings) shall be made to harmonize and correspond with the old work.

"All connections between new and old work must be as inconspicuous as possible; all patching of plaster or other materials is to be done in a neat and workmanlike manner. The new work must be securely bonded to the old and any cutting of the present work must be done with care. No unnecessary cutting shall be done.

* * * * * * *

"*Salvage material:* The attention of the contractor is called to the partitions, doors, shelves, handrail, etc., used in the space on the 7th floor of the Leiter Building now occupied by the Government. All of this material will be salvaged by the Government and reused by this contractor in the new quarters in the Butler Building as far as same will reach."

IV. On or about June 22, 1922, plaintiff received from the Veterans' Bureau a letter transmitting a list of the material proposed to be salvaged and reused in making alterations to the Butler Building (B), in accordance with the specifications aforesaid.

V. Plaintiff, accompanied by his estimator, visited the Leiter Building on or about June 25, 1922, and checked up the list of salvage material, and placed a value on each item on the list furnished. He found that a large portion of this material was readily removable without substantial damage, and capable of being used in the Butler Building. After considering the terms of the specifications plaintiff estimated the value of the salvage material that could be utilized by him in the performance of the contract, at the sum of $4,200.00, which was a fair value of the usable material in June, 1922.

VI. On June 28, 1922, plaintiff transmitted to the Veterans' Bureau his bid to perform the work stated for the sum of $42,860.00, and in making said bid allowance was made by him for the delivery of salvage material of the value of $4,200.00, which material the Veterans' Bureau had agreed to submit for his disposal and had required by the specifications should be used in the performance of said contract. Plaintiff's bid was accepted, and on July 19, 1922, formal contract was executed by the Veterans' Bureau and plaintiff, said contract being attached to the petition as Exhibit "C" and made a part hereof by reference.

VII. The salvage material in the Leiter Building was removed by the United States. A part of the material salvaged from the 7th floor of said building was carried to an Army supply building in Chicago and there intermingled with other salvaged material. Much of it was damaged and wholly unfit for use in the contract work. A part of it was missing, and, after an investigation by plaintiff, it could not be located.

Salvage material to the value of $472.00 was delivered to plaintiff and by him used in the contract work.

The difference between this sum and the value of all the salvaged material to be used in the work on the Butler Building was $3,728.00.

VIII. Plaintiff thereafter purchased the necessary material to complete his contract in place of the salvage material not delivered to him, the cost of which was in excess of $3,728.00. He completed his contract within the contract period ending September 27, 1922, the work was accepted by the United States, and the plaintiff was paid the contract price of $42,860.00. Prior thereto he filed his claim with the Veterans' Bureau for reimbursement in the amount of $3,728.00, representing the fair market value of the material usable in said contract but not delivered to him. On April 14, 1923, said claim was rejected by the Veterans' Bureau. Claim was thereafter filed with the General Accounting Office and rejected on August 31, 1925. An application for review of the rejection of the claim was denied by the Comptroller General under date of February 25, 1926.

Opinion of the Court

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, a resident of Chicago, Illinois, is engaged in the general contracting business. On June 13, 1922, the United States Veterans' Bureau solicited bids for the remodeling of a portion of the tenth and all of the eleventh floor of the Butler Building in Chicago. On the above date the Veterans' Bureau was occupying several floors of the Leiter Building and was to remove therefrom, after suitable repairs and changes to the Butler Building. The purpose of the proposals was to obtain a contract to make the essential repairs and changes in the Butler Building for the accommodation of the bureau. The plaintiff responded to the proposals and his bid was accepted, a written contract in accord therewith following. The contract contained the following express provisions:

"*Use of old material:* All old material which is removed from the 7th floor of the Leiter Building that is suitable and complies with the requirements of the specifications and drawings shall be reused in the new quarters. All old material used shall be reinstalled in neat and workmanlike manner. New work in connection with the old work (unless otherwise specified or noted on drawings) shall be made to harmonize and correspond with the old work.

"All connections between new and old work must be as inconspicuous as possible; all patching of plaster or other material is to be done in a neat and workmanlike manner. The new work must be securely bonded to the old and any cutting of the present work must be done with care. No unnecessary cutting shall be done.

* * * * * * *

"*Salvage material:* The attention of the contractor is called to the partitions, doors, shelves, handrail, etc., used in the space on the 7th floor of the Leiter Building now occupied by the Government. All of this material will be salvaged by the Government and reused by this contractor in the new quarters in the Butler Building as far as same will reach."

Prior to entering into the contract the plaintiff received a letter from the Veterans' Bureau containing a detailed list of salvaged materials, i. e., from the Leiter Building. It is true this list embraces material from other floors than the

seventh, and it is likewise apparent that it is not initialed by the director. The letter, however, is written on the stationery of the bureau and corresponds in directions to the time limit for bids to do the work. The director does not expressly disavow the letter or its contents; he simply says "that he didn't know why on earth such a list should be given to us." The plaintiff prior to submitting his bid visited the quarters of the bureau in the Leiter Building and carefully checked over and appraised the value of the available material and supplies in performing the proposed contract work. The Government officers made no attempt to deliver any portion of the salvaged material to the plaintiff. On the contrary, the plaintiff was compelled to request delivery, and upon so doing discovered that the entire lot had been deposited in a warehouse in the Army Supply Building at the foot of 39th Street, Chicago. This is not all; an inspection of the lot disclosed that most of the material had been removed with reckless abandon of its value for reuse. It was broken, twisted, and otherwise inexcusably injured and rendered unfit for use. Even the director of the bureau did not know where it was. As a matter of fact, not disputed, only a fractional portion of the material could be found in the warehouse.

As a result of this condition of affairs the contractor was enabled to use out of two or three truck loads sent to him salvaged material of the value of $472.00. To supply its place the contractor bought new material.

In making his bid, after the letter and personal inspection of the premises the contractor estimated the value of available salvaged material at $4,200, and allowed this sum in reaching the total consideration for which he agreed to do the work. Witnesses of experience and familiar with the work and conditions testify that the estimated loss to the contractor, due to failure to receive the salvaged materials, is most conservative; in fact, the amount claimed is firmly established as the minimum amount due.

The defendant's objection to a right of recovery is placed upon a literal and precise construction of the wording of the contract, i. e., objecting to the letter and relying upon the

Syllabus

contract, it is insisted that the plaintiff was not entitled to any salvaged material except such as was saved from the seventh floor of the Leiter Building.

The court is not compelled to go counter to this contention. Its inherent weakness is the lack of testimony showing that the plaintiff received all or any part of the salvaged material from the seventh floor. What the defendant did was to intermingle the whole lot from all the floors. No attempt was made to segregate it. It was all stored at the Army Base Building, and instead of doing what the contract obligated the defendant to do, i. e., salvage the material in such a way as to permit the reuse of all possible portions, it was removed irrespective of a saving to the contractor or the Government.

Surely we need not cite authorities to sustain a proposition that the Government can not induce a contractor to enter into a contract to repair and remodel a building, under the express representation that the consideration for the work may be fixed upon the hypothesis of salvaged material capable of reuse, and adapted to the plans and specifications, and then disregard every phase of the obligation. Granting the efficacy of the defendant's contention, and confining the case to the express letter of the contract, it is still incumbent upon the defendant to prove its compliance therewith, at least to meet the proven allegations of the plaintiff's petition, and this the defendant did not do. Not a single witness was called by the defendant.

Judgment for $3,728.00. It is so ordered.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and GRAHAM, *Judge*, concur.

ALASKA CONSOLIDATED CANNERIES, INC., v. THE UNITED STATES

[No. H-152. Decided February 4, 1929]

On the Proofs

Capital-stock tax; average value of capital stock; existence for part of year only.—The capital-stock tax, imposed by sec. 700 (a), revenue act of 1924, is an excise tax assessed and collected annually for the privilege of doing business in the following

year, and the tax is measured by the average value in the preceding year. Where a corporation is in existence during only a part of the previous year, and the value of its capital stock during that time does not fluctuate, the term "fair average value" as used in the statute has no importance, for it applies only where there are increases or decreases. The average meant is for the time the corporation is in existence, and does not include the time when the corporation is not in being.

The Reporter's statement of the case:

Mr. Andrew G. Elder for the plaintiff.

Messrs. Dwight E. Rorer and *R. S. Scott*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. The plaintiff is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Delaware, with its principal office in the city of Seattle, Washington.

II. Plaintiff was incorporated on or about March 4, 1925, with an authorized capital stock of $2,000,000 consisting of 20,000 shares of the par value of $100 each. Ten shares of the said capital stock, of the total par value of $1,000, were subscribed for but were not paid for nor issued until on or after June 1, 1925.

III. Plaintiff had no assets and was not engaged in carrying on or doing business prior to June, 1925. On or about the first day of June, 1925, plaintiff acquired certain salmon-canning plants of the fair value, in excess of the liabilities assumed, of $2,000,000, in payment for the said 10 shares of stock originally subscribed for as hereinbefore set forth in Finding II, and 19,990 shares of the said capital stock, such shares together representing the total authorized issue thereof of 20,000 shares.

IV. Plaintiff duly filed with the collector of internal revenue for the district of Washington, at Tacoma, Washington, on or about July 24, 1925, its capital-stock-tax return for the taxable period July 1, 1925, to June 30, 1926, representing the special tax imposed by section 700, Title VII, of the revenue act of 1924.

V. The said return showed, among other things, that the fair value of the capital stock of the plaintiff outstanding on June 30, 1925, was $2,000,000 and that the tax due thereon was $1,995, which said tax was paid by the plaintiff to the said collector of internal revenue for the district of Washington on or about August 6, 1925.

VI. On or about January 15, 1926, plaintiff duly filed with the collector of internal revenue for the district of Washington, at Tacoma, Washington, a claim for refund for the sum of $1,864, representing a portion of the said capital-stock tax as paid as stated in Finding V. Said claim for refund sets forth, among other things, that:

"The Alaska Consolidated Canneries, Inc., a Delaware corporation, was incorporated on March 4, 1925. It transacted no business until taking over certain properties on June 6, 1925. A capital-stock tax return was filed for the taxable period ending June 30, 1925, and the tax paid on the fair value of the shares of stock outstanding at that date, on the basis of a full year, whereas the tax should have been computed on the fair value of the capital stock as averaged, or 1/12. On such basis the capital-stock tax liability should be computed as follows:

Fair value of capital stock outstanding 6/30/25	$2, 000, 000. 00
Averaged	136, 666 .67
Less—Specific exemption	5, 000. 00
Balance	131, 666. 67
Tax at $1.00 for each full thousand	131. 00
Tax paid	1, 995. 00
Amount overpaid for which claim is filed	1, 864. 00"

VII. The said claim for refund was rejected by the Commissioner of Internal Revenue in a letter dated March 20, 1926, which letter referred to Treasury Decision 3771, amending articles 14 and 15 of Regulations 64. Said letter reads as follows:

Opinion of the Court

MT–CST–Wash–18106–JS

ALASKA CONSOLIDATED CANNERIES, INC.,
MUTUAL LIFE BUILDING.
Seattle, Wash.

Claim	*List*	*P.*	*L.*	*Amount*
R31681	July, 1925	393	8	$1,864

GENTLEMEN: Consideration has been given to your claim for the refunding of $1,864, part of capital-stock tax for the taxable period ending June 30, 1926.

It is noted you contend that your company was engaged in business for only one month preceding the taxable period in question. It is therefore alleged that the corporation should be taxed on the basis of one-twelfth of its fair value of the capital stock in accordance with the provisions of T. D. 3771. The following provision is quoted from that T. D.:

"A corporation in existence less than a year on July 1 of the taxable period will be permitted to consider values only during that portion of the year it was in existence."

In other words, a corporation is permitted to average the fair value of its capital stock only over the time of its existence. Since your company existed only one month, it would be obviously inconsistent with the above-quoted provision to average the fair value of the capital stock over a period of twelve months.

It is held that the fair value of the capital stock and the amount of tax originally reported by the company are correct. The claim is accordingly rejected.

Respectfully,

(Signed) D. H. BLAIR,
Commissioner.

AEF

The court decided that plaintiff was not entitled to recover.

MOSS, *Judge*, delivered the opinion of the court:

The facts in this case are stipulated by the parties, and may briefly be stated as follows:

Plaintiff was incorporated in March, 1925, with an authorized capital stock of $2,000,000. It had no assets, and was not engaged in business prior to June 1, 1925. On that date plaintiff acquired certain salmon-canning plants of the value of $2,000,000, in payment of the total authorized issue of 20,000 shares of the stock in plaintiff company. On July 24, 1925, plaintiff filed its capital-stock tax return for the taxable period July 1, 1925, to June 30, 1926, showing, among other facts, the fair value of the capital stock of plaintiff

on June 30, 1925, to be $2,000,000, and paid the tax shown to be due by said return amounting to $1,995. Plaintiff thereafter filed a claim for the refund of $1,864 of this amount on the ground that inasmuch as plaintiff was engaged in business only for the month of June in the year 1925 the fair value of the stock should have been computed by taking one-twelfth of the value of same, which method would result in a tax liability of only $131. The claim was rejected, and this action is brought for the recovery of said sum, $1,864.

The tax in question, known as the capital-stock tax, is imposed by section 700 (a) of the revenue act of 1924, 43 Stat. 325, which reads as follows:

"On and after July 1, 1924, in lieu of the tax imposed by section 1000 of the revenue act of 1921—

"(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

"(2) * * *

"(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business * * * during the preceding year ending June 30, * * *."

The capital-stock tax is an excise tax imposed on a corporation for the privilege of doing business. It is assessed and collected *annually* for the privilege of doing business in the following year, and the tax is measured by values relating to the preceding year. Regulations 64 (1924 edition), article 14 as amended by Treasury Decision 3771, contains the clear and pertinent statement: "The tax is measured by the fair average value of the capital stock of the corporation for the year ending June 30 preceding the taxable period. A corporation *in existence less than a year on July 1 of the taxable period* will be permitted to consider values only *during that portion of the year it was in existence*." (Our italics.) In the present case the corporation was in existence only for the month of June in the year preceding the taxable period. There was no change whatever in the value of the stock from June 1 to June 30, 1925. Where there is no change in value,

Syllabus

there is no occasion for determining the "fair average value." It is only in case of an increase or a decrease in value that the term used in the statute, "fair average value," has any importance. The regulation above cited contains the statement: "A corporation in existence less than a full year will *average* the shares outstanding from the date of its incorporation to June 30 following. (Our italics.) Again, it is suggested that it is not possible to apply the rule of the *average* mentioned in this regulation to a value which has neither been increased nor decreased during the period under consideration, to wit, during the month of June, 1925. It must be borne in mind that the sole purpose of ascertaining the value for the preceding year is to obtain a measure for the computation of the tax for the coming year. The case relied on by plaintiff, *One Liberty Street Realty & Securities Corporation* v. *Bowers*, 8 Fed. (2d) 278, has no application to the question involved here. In that case the value of the capital stock was enhanced by substantial increases. The court held, in substance, that the fair value of the capital stock was not the same throughout the year, and that the commissioner should have considered that fact in ascertaining the *fair average value* of the stock for the preceding year. Plaintiff is not entitled to recover, and the petition will be dismissed.

SINNOTT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

EWART G. HAAS v. THE UNITED STATES

[No. H-422. Decided February 4, 1929]

On the Proofs

Navy pay; dependent mother; rental and subsistence allowances; sec. 4, act of June 10, 1922.—Section 4 of the act of June 10, 1922, does not intend that the dependent mother should receive only the bare necessities of life, but contemplates the mother's station in life. The question of dependency is one of fact, in which the moral obligation of other children to support the mother does not enter. Cf. *Freeland* v. *United States*, 64 C. Cls. 364, and *Tomlinson* v. *United States*, *ante*, p. 697.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the briefs.

Messrs. M. C. Masterson, *Charles F. Kincheloe*, and *Frank J. Keating*, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant.

The court made special findings of fact, as follows:

I. From July 1, 1924, to June 30, 1927, and thereafter the plaintiff was a lieutenant commander in the United States Navy on active duty.

II. From July 1, 1924, to June 30, 1927, and thereafter the plaintiff's mother, Mrs. Marion S. Haas, was dependent upon him for her chief support by reason of the following facts and circumstances:

His father died in November, 1916, and his mother is a widow 72 years of age in 1928. Neither by age, physical condition, nor training is she in a condition to engage in any gainful occupation. Including the plaintiff, she has 5 children, 4 sons and 1 daughter, now living. She has no property from which an income might be derived, and since the death of her husband has been supported by contributions from plaintiff and two other sons. The status of her children is as follows:

Walter S. Haas is a lieutenant commander of the United States Navy, which rank he has held since 1923, and from 1922 his pay and allowances have been approximately $450.00 per month. He is married, without children, and receives an allowance for a dependent wife. He contributes $25.00 a month to the support of his mother.

William R. Haas is employed as a clerk at a salary of $100.00 per month. He lives in the same house with his mother at Newport, Rhode Island, and contributes a total of $40.00 a month to the household expenses on account of receiving room and board.

Albert F. Haas is assistant superintendent of the New England Navigation Company, and since December 1, 1927, has received a salary of approximately $3,500.00 a year. Prior to that date he received a salary of between $2,500.00

and $3,000.00. He is forty-four years of age, married, and has one child. He has contributed nothing to the support of his mother.

The daughter, Gertrude H. Frederick, is married, with two children. She has no income of her own and is entirely dependent upon her husband for support, and does not contribute anything to the support of her mother.

The plaintiff in 1923 purchased the home in Newport, Rhode Island, for his mother from his own funds and credit. He still owes $4,000.00 thereon, secured by mortgage. In this house his brother, William R. Haas, also lives with their mother, as before stated.

Plaintiff has also owned during the period in question a small bungalow at Jamestown, Rhode Island, which he built in 1914 and on which he still owes $1,000.00 secured by mortgage. His mother lives in this bungalow for a month or two each summer; at other times she lives in the house purchased for her by the plaintiff, as before stated. The plaintiff also lived with his mother about eleven months during the period involved. Her general health has been good and she performed the necessary household duties incident to maintaining a home for herself and her son, William, in an eight-room house, with the services of a girl once or twice a week to assist in cleaning.

At all times since the death of her husband plaintiff has given and still gives to his mother a monthly allowance of $150.00, with additional contributions from time to time. Out of this amount, plus the contributions from her other two sons, as hereinbefore stated, she pays her living expenses, which are estimated by the plaintiff to amount to $2,400.00 or $2,500.00 a year, but which can not be accurately determined on account of the fact that one son lives with her continuously and the plaintiff occasionally. Out of the contributions made by plaintiff to his mother she has paid the interest on the mortgage on the house occupied by her and taxes and insurance on said property, amounting to approximately, $350.00 a year.

III. Plaintiff has received rental and subsistence allowance as an officer without dependents at all times subsequent to June 30, 1924.

Opinion of the Court

If entitled to rental and subsistence allowance as an officer with a dependent from July 1, 1924, to June 30, 1927, the last date furnished by the General Accounting Office, there would be due plaintiff for that period a difference of $4,144.00 above the amount which he has received, and from the last named date up to the date of entering judgment herein, rental and subsistence allowance at the same rate.

The court decided that plaintiff was entitled to recover, judgment to be entered upon receipt of a report from the General Accounting Office showing the amount due.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff, who is a naval offcer and on active duty from July 1, 1924, to June 30, 1927, and thereafter, brings this suit to recover an allowance for a mother alleged to be dependent upon him, making the claim under the act of June 10, 1922, 42 Stat. 625. The case turns upon the construction of section 4 of the statute, which reads as follows:

"That the term 'dependent' * * * shall also include the mother of the officer, provided she is in fact dependent on him for her chief support."

The facts further show that the plaintiff's mother is not in any way fitted to engage in any gainful occupation, and that of her four children, besides the plaintiff, one is a naval officer who is receiving pay and allowances of about $450.00 per month and contributes $25.00 a month to her support. Another, who is a clerk on a salary of $100.00 a month, lives with her in a house provided by plaintiff and contributes $40.00 a month toward the household expenses. Another, who has been receiving a salary from $2,500.00 up to $3,500.00 a year, which is his present pay, contributes nothing; and her daughter is unable to contribute anything. The plaintiff contributes $150.00 a month toward the support of his mother besides providing the house, and her total living expenses are estimated at about $2,400.00 a year.

The main contention on behalf of the defendant is that the other children ought to contribute according to their ability; and if by reason of their failure so to do the court

holds that the plaintiff is entitled to an allowance for the support of his mother the result would be to shift the burden from those who ought to bear it onto the Government; but we are not concerned with the moral obligations of the other children of plaintiff's mother and do not need to determine whether any of them ought and should contribute further to the support of their mother. In any event, there is no way to compel further contributions. We must take the situation of plaintiff's mother as we find her and determine whether she is in fact dependent upon him for her chief support.

As before recited, the evidence shows that she receives in addition to what plaintiff pays only $25.00 directly from one son and $40.00 from another who lives with her and contributes this sum as a part of the household expenses, apparently in part to pay for his board and room. The payment last referred to is little, if any, advantage to her, considering what she furnishes in return, and it seems quite evident that plaintiff's mother is in fact dependent upon him for her chief support. It is not necessary in order to come to this conclusion that we should determine that $200.00 a month, in addition to furnishing the house, was necessary or proper for her living expenses. If only half of that amount were fixed as necessary, she would still be chiefly dependent upon the plaintiff, as the son who lives with her pays less than his board and room would be worth. The plaintiff is a lieutenant commander in the Navy, and the facts indicate a certain degree of social standing for the family. We think Congress contemplated that the amount necessary for the support of a dependent should depend to some extent upon their station in life, and we hold that the law does not intend that the dependent mother should receive only the bare necessities of life.

It follows that plaintiff is entitled to recover the rental and subsistence allowance fixed by law for an officer of his rank, having a dependent mother, from July 1, 1924, and judgment will be entered accordingly.

SINNOTT, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

JAMES B. GLENNON v. THE UNITED STATES

[No. J-278. Decided February 4, 1929]

On the Proofs

Commutation of quarters, U. S. Navy; act of June 10, 1922, as amended by act of May 31, 1924; availability of quarters.—Where no quarters are assigned to an officer of the Navy for the occupancy of himself or his dependents, he is entitled under the act of June 10, 1922, as amended by the act of May 31, 1924, to rental allowance as an officer with dependents. This is so notwithstanding the dependents are the guests of an officer of the Marine Corps in quarters assigned thereto. Cf. *Bell, administrator,* v. *United States,* 65 C. Cls. 182.

The Reporter's statement of the case:

Mr. George A. King for the plaintiff. *King & King* were on the briefs.

Mr. F. J. Keating, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. M. C. Masterson* was on the brief.

The court made special findings of fact, as follows:

I. The plaintiff, James B. Glennon, was, during the period covered by this claim, a lieutenant commander, United States Navy, on active sea duty.

II. Plaintiff was married in 1917 to the daughter of Major General John A. Lejeune, Commandant of the Marine Corps, and they have two children.

III. From September 24, 1922, to April 14, 1925, plaintiff was on sea duty in command of the U. S. S. *Sands*. During all that period no Government quarters were assigned to him for the occupancy of either himself or his dependents.

IV. During the periods February 1 to May 13, 1923, October 1 to November 15, 1923, January 1 to May 5, 1924, and January 1 to April 14, 1925, the plaintiff's wife and children resided with her parents, at their invitation, at the house at the Marine Barracks, Washington, D. C., furnished by the Government to plaintiff's father-in-law, Maj. Gen. John A.

Lejeune, then Commandant of the Marine Corps, as his residence.

V. The plaintiff drew rental allowance on vouchers signed by himself from Lieutenant J. F. Rupert, Supply Corps, United States Navy, at some date subsequent to the passage of the act of May 31, 1924 (43 Stat. 250), and after the last date covered by this claim, in the sum of $1,263.33. This is the amount plaintiff would be entitled to if entitled to rental allowance for those periods as an officer with dependents.

At a subsequent date this entire amount was checked against the supply officer by the Comptroller General as having been improperly paid the plaintiff. Lieutenant Rupert, the supply officer, requested the plaintiff to refund the amount for the protection of himself (the supply officer). The Chief of the Bureau of Navigation suggested to the plaintiff that he ought to make the refund. This decision was concurred in by the Secretary of the Navy and communicated to the plaintiff. A checkage was thereupon made at the rate of $50 a month. It was noted on the official request for checkage that "checkage has been consented to by Commander Glennon subject to claim in the Court of Claims."

VI. The records of the General Accounting Office show recovery of rental allowance from the plaintiff to the amount of $324.34, which amount includes the sum of $200 for which plaintiff was twice given credit for rental allowance for the period from February 1 to March 31, 1923; $50 deducted from his pay, and $74.34 withheld from moneys due plaintiff as overassessment of income tax.

The court decided that plaintiff was entitled to recover.

GRAHAM, *Judge*, delivered the opinion of the court:

Plaintiff was during the period covered by this claim a lieutenant commander in the United States Navy on active sea duty in command of the United States steamship *Sands*. He had dependents consisting of his wife and children. During all of said period no Government quarters were assigned to him to be occupied either by himself or his dependents. From February 1 to May 13, 1923, October 1 to

November 15, 1923, January 1 to May 5, 1924, and January 1 to April 14, 1925, his wife and children resided with her parents as their guests, at the house furnished as a residence to plaintiff's father-in-law, Gen. John A. Lejeune, at the Marine Barracks, Washington, D. C., General Lejeune being at the time Major General and Commandant of the United States Marine Corps.

The principles involved here have several times been passed upon by the court and it is not necessary to review them. Under the applicable acts, viz, act of June 10, 1922, 42 Stat. 628, and act of May 31, 1924, 43 Stat. 250, amendatory thereof, rental allowance, both by the law and the regulations, was granted an officer with dependents except only where sufficient quarters were assigned to the officer. No quarters in this case were assigned to the plaintiff, and he was consequently entitled to the allowance claimed.

The fact that his wife and children happened at certain periods to be guests of his father-in-law and in this way he was relieved of expense does not affect the question. It is true that the house occupied by General Lejeune was owned by the Government, but it had been assigned to him as a residence for his exclusive use and had not been in any sense assigned to the plaintiff; General Lejeune had a right, if he saw fit, to have such guests as he might desire. That he did have plaintiff's dependents as his guests at different times does not affect the plaintiff's rights here in the least. See *Freeland* v. *United States*, 64 C. Cls. 364, and *Corkery* v. *United States*, 65 C. Cls. 524.

The record does not disclose the amount to which plaintiff is entitled. Plaintiff claims "the sum of $1,263.33, or so much thereof as has been deducted from his pay to the date of the rendition of judgment, * * * plus the sum of $74.34 withheld on account of income tax." Plaintiff is therefore entitled to recover such a sum as has been deducted from his pay to the date of rendition of the judgment herein, and also the sum of $74.34, withheld from him on an overassessment of his income, the amount of judgment to be computed by the General Accounting Office.

Judgment is suspended to await the ascertainment of this undetermined sum and the proper certification of it to the court.

SINNOTT, *Judge;* GREEN, *Judge;* MOSS, *Judge;* and BOOTH, *Chief Justice*, concur.

JAMES CLARK DISTILLING CO. OF CUMBERLAND, MARYLAND, FOR THE USE OF JAMES CLARK AND SAFE DEPOSIT & TRUST CO. OF BALTIMORE, AS EXECUTOR OF THE WILL OF JOHN KEATING, v. THE UNITED STATES [1]

[No. F–220. Decided February 4, 1929]

On the Proofs

Income and profits taxes; inventory at cost; change to market basis; discretion with Commissioner of Internal Revenue.—A distilling company, prior to the revenue act of 1918, made its inventories at cost, and its books reflected no profit until sales were made, the difference between manufacturing cost and market value of unsold product not appearing thereon. After making its tax returns accordingly it changed its inventories for the year 1918, substituting market for cost value, and used the new basis in its tax return for 1918 without the permission of the Commissioner of Internal Revenue, and the commissioner assessed additional taxes on the basis of cost value. *Held*, (1) that collection of the additional taxes was not confiscation of capital, and (2) that both the use and the basis of inventories were matters of discretion with the commissioner.

Statutes; departmental construction; reenactment by Congress.—Where an executive department has construed a statute a certain way, its reenactment by Congress without change is an adoption of such construction by Congress.

The Reporter's statement of the case:

Mr. Charles Markell for the plaintiff. *Haman, Cook, Chesnut & Markell* were on the brief.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Herman J. Galloway*, for the defendant. *Mr. Ottamar Hamele* was on the brief.

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[1] Certiorari denied.

The court made special findings of fact, as follows:

I. The plaintiff, the James Clark Distilling Company of Cumberland, Maryland, is a corporation organized and existing under the laws of the State of Maryland and has its principal place of business at the city of Cumberland, in said State, and prior to 1917 was for many years engaged in the business of manufacturing and selling whiskey. Until May, 1921, James Clark and John Keating, each of Cumberland, Maryland, who are half brothers, were the sole stockholders of the plaintiff. Throughout the year 1918 and for some years prior thereto, and thereafter until May, 1921, James Clark and John Keating each owned one-half of the capital stock of the plaintiff. At present the plaintiff is not actually engaged in any business at all.

II. In the ordinary course of business prior to 1917 the plaintiff would distill whiskey, store it in bonded warehouse, hold it in storage for varying periods, and eventually sell it. At any particular time therefore the plaintiff would own a large amount of whiskey of various ages, some just distilled, some a number of years old. Within a given year or other period the plaintiff's stock of whiskey would be increased by manufacture and decreased by sales of the product of previous years.

III. Prior to the passage of the revenue act of 1918 the plaintiff always carried its unsold manufactured product on its books at cost. The plaintiff's books therefore never reflected any profit from manufacture until such profit was realized through actual sale. Profit accrued but not received, comprising the difference between the manufacturing cost and the market value of unsold manufactured products, thus never appeared on its books. The plaintiff's so-called "inventories" taken annually or semiannually were entered on its books at cost, not at market value. For ordinary bookkeeping purposes this practice was not then unusual among conservatively managed manufacturing enterprises.

IV. In the case of the plaintiff, the market value of whiskey on and after December 19, 1917, was always higher than its cost.

Reporter's Statement of the Case

V. Throughout the calendar years 1917 and 1918 and earlier, the business of the plaintiff, like that of other distillers of whiskey, was not conducted in the ordinary course as it previously had been conducted. After 1916 the plaintiff did no distilling. During the calendar years 1917 and 1918 the plaintiff sold practically all the whiskey which had been manufactured by it in previous years and was still on hand on January 1, 1917. Only a few barrels of whiskey remained on hand on January 1, 1919, and this was sold in January and February of 1919. By the end of February, 1919, the plaintiff had gone out of business so far as the sale of whiskey is concerned.

VI. During these two years, 1917 and 1918, which proved to be the plaintiff's liquidation period, the price and market value of whiskey everywhere greatly increased because of (*a*) increased costs, (*b*) war prohibition of manufacture, and (*c*) approach of general prohibition.

VII. Within ten days after the passage (on February 24, 1919) of the revenue act of 1918, the plaintiff, through a personal conference on the part of the plaintiff's vice president and plaintiff's counsel at the office of the Commissioner of Internal Revenue, followed by a letter dated March 12, 1919, from counsel for the plaintiff to the Commissioner of Internal Revenue, communicated to the Treasury Department the plaintiff's desire, and asserted a right, under section 202 (a) of the revenue act of 1918, to use for the purpose of ascertaining the gain derived from sales of the plaintiff's manufactured product in 1918, inventory value at market, as the basis of computation. For this purpose inventories were promptly taken, i. e., revalued, by the plaintiff as of January 1, 1918, and December 31, 1918, upon said basis of market value. Subsequently the plaintiff made its income and profits tax return for the calendar year 1918, in which (first stating fully the facts) it used, as the basis for ascertaining such gain inventory value at market as of January 1, 1918, and similarly used, as the basis for computing income in respect of unsold merchandise, inventory at market as of December 31, 1918. The plaintiff, together with its income and profits tax return for 1918, filed adjusted returns for 1917 and previous years, showing taxable income adjusted up from the

basis of cost to the basis of market value of unsold goods as of January 1, 1918. The plaintiff's income and profits tax return for 1918 showed income and profits taxes aggregating $99,577.46, which the plaintiff paid. The plaintiff's adjusted returns for 1917 and previous years showed additional income and profits taxes aggregating $56,090.60, which the plaintiff also paid. In a letter to the collector of internal revenue accompanying its return for 1918 and adjusted returns for previous years the plaintiff reasserted a right under section 202 (a) of the revenue act of 1918 to use inventory value at market as the basis for ascertaining gain from sales. Subsequently in repeated letters to the Commissioner of Internal Revenue the plaintiff asserted the same right and also made formal request that (*a*) if necessary in order to give proper recognition to this right and (*b*) independently of this right asserted by the plaintiff under section 202 (a), the commissioner pursuant to section 203 of the revenue act of 1918 make appropriate regulations, or changes in existing regulations, prescribing the basis for inventories, so as expressly to recognize the right to use market value, whether lower or higher than cost. The commissioner never gave plaintiff permission to use for inventory purposes any other basis than cost.

VIII. Throughout the year 1918 the market value of whiskey, including whiskey in bond, represented by certificates, such as the whiskey then owned by the plaintiff, was readily realizable.

IX. After examination of the plaintiff's return for 1918 by representatives of the Commissioner of Internal Revenue, the commissioner using cost and refusing to use or permit the use of inventory value at market as of January 1, 1918, for ascertaining gain derived from sales of merchandise during 1918, thereby professed to increase by $241,-389.54 the amount of the plaintiff's net income for 1918 as returned by the plaintiff. After making other changes, not now in dispute, the commissioner determined the plaintiff's net income for 1918 to be $402,964.05, redetermined under section 328 of the revenue act of 1918 the profits tax thereon to be $231,057.50, and the income tax $20,388.79, a total in-

come and profits tax of $251,446.29, viz, an additional tax of $151,868.83 over and above the tax of $99,577.46 shown by the plaintiff's return and paid by the plaintiff. The commissioner accordingly assessed, and the collector of internal revenue demanded of the plaintiff, this additional tax of $151,868.83 for 1918 against which were credited (1) $56,090.60, tax shown on the plaintiff's adjusted returns for 1917 and previous years and paid by the plaintiff and (2) $7,860.14, overassessment for 1917 determined by the commissioner, leaving a final balance of $87,918.09, which on March 10, 1924, was paid under protest. This payment of $87,918.09 was made to the collector of internal revenue on behalf of the plaintiff by James Clark and John Keating.

X. In May, 1921, the plaintiff, pursuant to resolution of its board of directors, distributed to its stockholders, viz, James Clark and John Keating, all cash, securities, and accounts and notes receivable, on condition that said stockholders indemnify the plaintiff against all liability or expense by reason of any disputed Federal taxes for years prior to 1921 or any expenses in connection therewith, provided that James Clark and John Keating, the stockholders to whom such distribution was made, might, and they thereby were irrevocably authorized so to do, at their own expense, but in the name of the plaintiff, defend, prosecute, adjust, compromise, or settle with or before any department, officer, or employee of the United States Government, or in any court or courts of competent jurisdiction any and all questions, disputes, claims, counterclaims, actions, or suits whatsoever in respect of any such disputed taxes or claims therefor. After such distribution and with full knowledge thereof and of the terms thereof on the part of both sellers and purchasers James Clark and John Keating sold all the capital stock of the plaintiff. As indemnitors, pursuant to the distribution on the condition aforesaid, James Clark and John Keating made the aforesaid payment of $87,918.09, additional taxes assessed for 1918.

XI. The use of inventory value at market as of January 1, 1918, instead of cost, as the basis for ascertaining gain derived from sales in 1918 would reduce the plaintiff's net

income for 1918 by $241,389.54 from $402,946.05, determined by the commissioner, to $161,574.51. The commissioner determined the plaintiff's invested capital for 1918 to be $551,-709.98. This amount does not include any part of $243,-229.68, the excess of inventory value at market as of January 1, 1918, over cost. If invested capital is computed as including this excess of market value over cost, then deductions should be made for withdrawals during 1918, and the true amount of invested capital for 1918 would be $745,467.56. On net income of $161,574.51 the correct amount of the plaintiff's total income and profits taxes for 1918, determined on the basis of invested capital of $745,467.56, would be $78,-304.48. Readjustment of income and profits taxes for 1917 up to the basis of inventory value at market as of January 1, 1918, instead of cost, would increase the plaintiff's net income for 1917 by $243,229.68, the excess of inventory value at market as of January 1, 1918, over cost. This readjustment would result in additional income and profits taxes for 1917 amounting to $111,887.89, viz, $116,367.81 instead of $4,479.92. The sum of $78,304.48, income and profits taxes for 1918, and $111,887.89, additional income and profits taxes for 1917, computed on the basis of inventory value at market as of January 1, 1918, instead of cost, is $190,192.37, which is $61,253.92 less than the total amount of income and profits taxes for 1918 actually exacted by the United States and paid, $87,918.09 thereof under protest, by or on behalf of the plaintiff.

XII. If plaintiff's profits tax for 1918 had been determined, not under section 328 but on the basis of $551,709.98 invested capital (determined by the commissioner), then the total income and profits taxes on net income of $402,964.05 (determined by the commissioner) would have been $290,849.99.

XIII. On February 25, 1925, the plaintiff filed with the collector of internal revenue a claim in the name of the plaintiff for the use of James Clark and John Keating for refund, of $61,253.92, the amount of income and profits taxes for the year 1918 exacted from and paid by the plaintiff as the result of computing such taxes on the basis of cost, in-

stead of inventory value at market. Said claim for refund was by the Commissioner of Internal Revenue disallowed and rejected on July 9, 1925. As the result of so computing taxes and taxable income, $241,389.54 excess of market value over cost existing on January 1, 1918, and realized by sale during the year 1918 has been included by the Commissioner of Internal Revenue as part of the plaintiff's taxable income for 1918 taxable under the revenue act of 1918 at the rates therein prescribed.

The court decided that plaintiff was not entitled to recover.

SINNOTT, *Judge*, delivered the opinion of the court:

On July 24, 1926, plaintiff brought this action against the defendant, for the use of James Clark and John Keating, to recover the sum of $61,253.92 paid as additional income and profits taxes for the year 1918. After the commencement of action John Keating died and, by order of the court, his executor, Safe Deposit & Trust Company of Baltimore, a corporation, was substituted as plaintiff.

Plaintiff was for years engaged in the business of manufacturing and selling whiskey. Until May, 1921, James Clark and John Keating were the sole stockholders of the plaintiff company, each owning one-half of the capital stock. In May, 1921, plaintiff distributed its assets to its two stockholders, on condition that they would indemnify plaintiff against loss in connection with Federal taxes, and thereafter Clark and Keating sold all the capital stock.

Plaintiff carried its unsold manufactured product on its books at cost. However, in the year 1919, after the passage of the revenue act of 1918 (40 Stat. 1057), plaintiff changed its inventories for the calendar year 1918, substituting market value for cost value—the former being higher than the latter—and made its tax return for 1918 in accordance with the altered inventories. Also it filed adjusted returns for 1917 and prior years. The Commissioner of Internal Revenue never gave plaintiff permission to use for inventory purposes any other basis than cost. Of the taxes paid by plaintiff, the sum sued for herein, $61,253.92, resulted from the action of the Commissioner of Internal Revenue in computing plaintiff's inventories at cost instead of at market value.

Opinion of the Court

Plaintiff filed with the collector of internal revenue a claim in the name of the plaintiff for the use of James Clark and John Keating for refund of said sum of $61,253.92, being the amount of income and profits taxes for the year 1918, exacted from and paid by plaintiff as a result of computing such taxes on the basis of cost instead of inventory value at market. Said claim for refund was disallowed by the Commissioner of Internal Revenue, July 9, 1925.

The following are the pertinent sections of the revenue act of 1918 (40 Stat. 1057):

"SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer * * *."

"SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property real, personal, or mixed, the basis shall be—

"(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

"(2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with Section 203.

"SEC. 203. That whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

The Treasury Department promulgated regulations from time to time presenting methods to which inventories must

conform for tax purposes. All of them contained substantially the same provisions, requiring inventories to be taken or valued "either (*a*) at cost or (*b*) at cost or market price, whichever is lower," except the Treasury Decision 3296, promulgated March 3, 1922, permitted dealers in securities to value the inventories "either (*a*) at cost or (*b*) at cost or market, whichever is lower, or (*c*) at market value." See Treasury Decision 2609, December 19, 1917; Treasury Decision 2690, January 2, 1918; Treasury Decision 2831, April 16, 1919; Treasury Decision 3108, December 30, 1919; Treasury Decision 3296, March 3, 1922.

Prior to February 24, 1919, the effective date of the revenue act of 1918 (40 Stat. 1057), plaintiff carried a stock of whiskey on its books at cost. During the years 1917 and 1918 the market price of whiskey greatly increased in value, due to increased cost, war-time prohibition of its manufacture, and the approach of general prohibition, so that whiskey manufactured in 1913, 1914, 1915, and 1916, although carried on the plaintiff's books at cost, was worth considerably more at market price from January 1, 1917, and reached a still higher valuation on January 1, 1918, and was sold during 1918 for a still higher figure.

The result of the ownership of the whiskey throughout the entire period of six years from 1913 to 1918, inclusive, was that the plaintiff received on the sales made in 1918 a profit which was the result of a gradual increase in value covering the whole period.

Plaintiff's position is that, on being compelled to pay the taxes in dispute, its capital has been confiscated under the guise of taxing income. This position is negatived by the language of the statute, section 213, *supra*, which provides that gains, profits, and income shall be included in the gross income for the taxable year in which received by the taxpayer.

Plaintiff's contention is answered in the cases of *Merchants Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509, and *Goodrich* v. *Edwards*, 255 U. S. 527. In the *Smietanka case* the property in question increased in value from $561,798 on March 1, 1913, to $1,280,996.64 on February 2, 1917. In

the *Edwards case* the property had increased in value from $695 on March 1, 1913, to $13,931.22 in March, 1916. In both of these cases the Supreme Court held that the appreciation in value was income and taxable when converted into money. The *Smietanka* and *Edwards cases*, *supra*, involve the revenue act of 1916, containing language practically identical with section 213, *supra*, of the act of 1918. The language is quoted in this *Smietanka case*, page 516:

"Section 2(a) of the Act of September 8, 1916 (39 Stat. 757; 40 Stat. 300, 307, § 212), applicable to the case, defines the income of 'a taxable person' as including 'gains, profits and income derived from . . . sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, . . . or gains or profits and income derived from any source whatever.'"

Plaintiff avoids the force of the *Smietanka* and *Edwards cases* by contending that section 202 (a) (2), *supra*, of the revenue act of 1918—

"* * * Expressly authorized the use, at the taxpayer's option, of 'inventory value,' *i. e.*, market value, instead of 'cost,' as the 'basis' for 'ascertaining the gain derived' from sales."

If this were the case it would render nugatory the language of section 203, *supra:*

"* * * Inventories shall be taken by such taxpayer upon such basis as the commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

We think that section 202 (a) (2) must be read in connection with section 203, *supra*, and when so read it is apparent that both the use and the basis of inventories were matters left to the administrative discretion of the commissioner.

We have decided this day that the basis of inventories was specially confided by Congress to the commissioner and Secretary. (*Riverside Mfg. Co.* v. *United States*, No. F-324.)[1] Our opinion is further strengthened by the quotation in defendant's brief from the House report on the reve-

[1] To be reported in next volume.

nue bill for 1918 (Rept. No. 767, 65th Cong., 2d sess., p. 4) as follows:

" BASIS FOR DETERMINING GAIN OR LOSS

" In determining gain or loss from the sale or disposition of property, real, personal, or mixed, the bill provides that the basis shall be as follows:

" In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and in the case of property acquired on or after that date, (1) the cost thereof, or (2) the inventory value, if the inventory is made in accordance with the rules and regulations to be prescribed by the Commissioner of Internal Revenue in order that the inventory may clearly reflect the income.

" INVENTORY

" In many cases the only way that the net income can be determined is through the proper use of inventories. This is largely true in the case of manufacturing and merchandise concerns. The bill authorizes the commissioner to require inventories whenever in his opinion the same is necessary in order clearly to reflect the income of the taxpayer."

In connection with the different regulations of the Treasury Department referred to above, requiring inventories to be taken "Either (*a*) at cost or (*b*) at cost or market price, whichever is lower," it is significant that in each succeeding revenue act, since 1918, Congress has reenacted, without change, the provisions of section 203 of the revenue act of 1918. (See sec. 203 of the revenue act of 1921, 42 Stat. 227; sec. 205 of the revenue act of 1924, 43 Stat. 253; sec. 205 of the revenue act of 1926, 44 Stat. 9; sec. 22 (c) of the revenue act of 1928, approved May 29, 1928.) It has been held that where a statute has been construed by the executive departments of the Government and has been reenacted without change, that such reenactment is an adoption of such construction by Congress:

" It is a familiar and well-established rule that where a statute that has been construed by the courts has been reenacted in the same or substantially the same terms, the Legislature is presumed to have been familiar with its construction and to have adopted it as a part of the law unless a different

intention is indicated. And the same principle is applied to statutes and parts of statutes which have been reenacted after they have been construed by the executive departments of the Government." (*Edwards, Collector*, v. *Wabash Ry. Co.*, 264 Fed. 610.)

We conclude that the commissioner was correct in rejecting the claim for the refund. The petition will be dismissed. It is so ordered and adjudged.

GREEN, *Judge;* MOSS, *Judge;* GRAHAM, *Judge;* and BOOTH, *Chief Justice*, concur.

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CASES DECIDED

IN

THE COURT OF CLAIMS

JUNE 1, 1928, TO FEBRUARY 4, 1929

INCLUSIVE, IN WHICH JUDGMENTS WERE RENDERED BUT NO OPINIONS DELIVERED

No. C–1061. June 18, 1928

Morgan's Louisiana & Texas R. R. & S. S. Co.
Land-grant deductions, act of October 6, 1917, $2,155.38.

No. C–1069. June 18, 1928

New Orleans, Texas & Mexico Ry. Co.
Land-grant deductions, act of October 6, 1917, $60.43.

No. D–547. June 18, 1928

MacArthur Bros. Co.
Cost of premiums, etc., under war contract, $3,500.00.

No. F–139. June 18, 1928

Galveston, Harrisburg & San Antonio Ry. Co.[1]
Transportation of private mounts of Army officers, $475.17.

No. C–38. June 18, 1928

National Electrical Supply Co.
Infringement of patents for transmitting apparatus for wireless telegraphy and design for casing for wireless telegraph generator, $14,791.08. (See 64 C. Cls. 617.)

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[1] Certiorari granted.

No. F-30. JUNE 18, 1928

Hoopes & Townsend Co., etc.
Contract for manufacture of rivets, Navy. Dismissed. (See *Burns et al., receivers*, v. *United States*, *ante*, p. 142.)

No. C-980. JUNE 18, 1928

Nassau Smelting & Refining Works, Ltd.
Balance due on contract for copper, War Department. Dismissed.

No. H-512. JUNE 18, 1928

Pocono Pines Assembly Hotels Co.
Damages to property leased to Federal Board for Vocational Education. Dismissed.

No. E-405. JUNE 18, 1928

Edward A. Faust.
Refund of income and excess-profits taxes, $7,269.60 with interest. (See 65 C. Cls. 676.)

No. C-1324. JUNE 18, 1928

New York Polyclinic Medical School and Hospital.
Recovery for deterioration of leased premises, $58,435.00.

No. F-287. JUNE 18, 1928

Eli Hess.
Damage to eggs, parcel post. Dismissed.

No. B-43. OCTOBER 8, 1928

Galveston, Harrisburg & San Antonio Ry. Co.
Transportation of military impedimenta, $4,027.10.

No. E-61. OCTOBER 8, 1928

Ware Radio, Inc.
Infringement of radio patents, $15,000.

No. E-430. OCTOBER 8, 1928

National Life Insurance Co.
Refund of income tax, $92,495.29, with interest. On mandate of Supreme Court. (63 C. Cls. 256; 277 U. S. 508.)

No. H-207. OCTOBER 8, 1928

Ellis W. Craig.

Retired pay, commodore, U. S. Navy, $1,868.75. (See 65 C. Cls. 699.)

No. C-1078. OCTOBER 8, 1928

James B. Hutchinson.

Increased pay, retired officer, Philippine Scouts. Dismissed.

No. D-506. OCTOBER 8, 1928

D. F. Mathews.

Interest on payment for real property, War Department. Dismissed.

No. D-507. OCTOBER 8, 1928

E. Z. Hall.

Interest on payment for real property, War Department. Dismissed.

No. E-417. OCTOBER 8, 1928

McAteer Shipbuilding Co.

Contract for construction of steel vessel. Dismissed.

No. C-971. OCTOBER 15, 1928

St. Louis-San Francisco Ry. Co.

Transportation of freight to Fort Sill and Camp Doniphan, $521.85.

No. F-374. OCTOBER 15, 1928

L. & E. Frenkel, Inc.

Refund of income tax, $62,767.38 with interest.

No. H-260. OCTOBER 15, 1928

Earl McFarland.

Additional compensation, professor, West Point, $675.00.

No. H-261. OCTOBER 15, 1928

Charles G. Mattler.
Additional compensation, professor, West Point, $675.00.

No. F-341. OCTOBER 15, 1928

Joseph T. Ryerson & Son, Inc.
Interest on overassessment of income tax. Dismissed.

No. H-103. OCTOBER 15, 1928

Ira S. Lillick.
Professional contract services. Dismissed.

No. E-601. OCTOBER 15, 1928

Christian B. Torp et al.
Breach of contract for sale of S. S. *Raritan.* Dismissed.

No. C-1280. OCTOBER 15, 1928

Regina C. Montgomery et al.
Infringement of patent—airplanes. Dismissed.

No. D-204. OCTOBER 22, 1928

Adelaide F. Chapman.
Refund of income tax; profit from sale of stock, $64,199 with interest. On mandate of Supreme Court. (63 C. Cls. 424; 278 U. S. 660.)

No. J-240. OCTOBER 22, 1928

Frank Dial.
Damages for use of copyrighted publication. Dismissed.

No. B-27. DECEMBER 3, 1928

St. Louis, Brownsville & Mexico Ry. Co.
Party-fare combinations, $45,551.78.

No. B-172. DECEMBER 3, 1928

Nashville, Chattanooga & St. Louis Ry.
Net fares under special agreement, $4,606.44.

No. C-757. DECEMBER 3, 1928

Louisville & Nashville R. R. Co.
Party-fare combinations, $645.05.

No. F-51. DECEMBER 3, 1928

Lincoln Ellsworth et al., executors.
Recovery of rent, $16,333.32.

No. H-535. DECEMBER 3, 1928

Michigan Central R. R. Co.
Freight shipments to Camp Custer, Mich., $376.80.

No. C-694. DECEMBER 3, 1928

Guy B. Lawrason.
Recovery of active-duty pay, major, U. S. Army. Dismissed.

No. F-243. DECEMBER 3, 1928

Neville Levy.
Return of deposit on purchase of tug. Dismissed.

No. J-610. DECEMBER 3, 1928

Harry B. Stilz.
Infringement of letters patent. Dismissed.

No. J-579. DECEMBER 3, 1928

John H. Grotness.
Pay of discharged soldier. Dismissed.

No. C-1306. DECEMBER 3, 1928

Waldemar F. Breidster.
Rental allowances, War Department. Dismissed.

No. D-808. DECEMBER 3, 1928

United States Conservation Co.
Contract for manure; breach; damages, $11,198.05. Following *Bradley* v. *United States*, *ante*, p. 551.

No. F-159. DECEMBER 10, 1928

Harris Brothers Co.
Sale of surplus property, War Department, $35,000.

No. D-562. DECEMBER 10, 1928

George M. Self.
Contract for hay. Dismissed.

No. D-48. DECEMBER 10, 1928

Joseph Greenspun.
Additional pay for cadet service, War Department. Dismissed.

No. J-623. DECEMBER 10, 1928

Andrew Boyd Rogers.
Personal injuries received in Marine Corps. Dismissed.

No. F-170. DECEMBER 10, 1928

New National Oil Co.
Breach of contract. Dismissed.

No. F-84. JANUARY 7, 1929

Pennsylvania R. R. Co.
Transportation of military impedimenta, $28,473.49.

No. F-315. JANUARY 7, 1929

Pennsylvania R. R. Co.
Transportation of coal, War Department, $2,784.17.

No. D-419. JANUARY 7, 1929

Levering & Garrigues Co.
Work, labor, and materials furnished under contract. Dismissed.

No. J-45. JANUARY 7, 1929

George H. Holmes.
Active-duty pay while in hospital, 2nd lieutenant, Army. Dismissed.

No. H-256. JANUARY 7, 1929

George N. McKane.
Compensation for use of weaving machine. Dismissed.

No. F-63. JANUARY 7, 1929

Allen B. Wrisley Co.
Implied contract for dynamite glycerine. Dismissed.

No. F-353. JANUARY 7, 1929

Richard Lee Edwards.
Fees as U. S. Commissioner. Dismissed.

No. C-758. JANUARY 7, 1929

American Surety Co.
Recovery of surety bond. Dismissed.

No. E-544. JANUARY 19, 1929

Reed Propeller Co.
Infringement of patent. Dismissed.

No. C-534. FEBRUARY 4, 1929

Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.
Land-grant deductions, act of October 6, 1917, $8,194.38.

No. C-966. FEBRUARY 4, 1929

Doullut & Williams Co.
Repairs due under lease, $3,820.86.

No. E-393. FEBRUARY 4, 1929

Mann Lumber Co.
Costs and expenses in fighting forest fires, $11,520.55.

No. E-483. FEBRUARY 4, 1929

Carl W. Lortz.
Pay as candidate for commission, U. S. Army, $218.86.

No. F–179. FEBRUARY 4, 1929

Illinois Central R. R. Co.

Freight on shipments to Aviation Field, Millington, Tenn., $1,992.97.

No. H–292. FEBRUARY 4, 1929

James J. Morgan.

Additional pay, aviation duty, $236.25.

No. H–242. FEBRUARY 4, 1929

Bethlehem Orphan & Half-Orphan Asylum.

Restoration of leased premises, $6,014.05.

No. J–295. FEBRUARY 4, 1929

Annie V. Elkema et al., trustees.

Restoration of leased premises, $4,783.32.

No. D–386. FEBRUARY 4, 1929

Julius J. Goetz, receiver.

Damages for delay on construction contract. Dismissed.

No. E–38. FEBRUARY 4, 1929

Robert H. Lenson.

Navy pay; fourth-pay period; act of June 10, 1922. Dismissed. On mandate of Supreme Court. (63 C. Cls. 420; 278 U. S. 60.)

No. C–7. FEBRUARY 4, 1929

New River Collieries Co.

Contract for bituminous coal. Dismissed.

No. C–703. FEBRUARY 4, 1929

Edwin Howard Armstrong.

Infringement of patent—wireless receiving system. Dismissed.

No. E–45. FEBRUARY 4, 1929

Charles A. Costello.

Difference in pay, Navy. Dismissed.

No. H-174. FEBRUARY 4, 1929

Healey-Aeromarine Bus Co.

Infringement of patent—engine-starting devices. Dismissed.

No. J-626. FEBRUARY 4, 1929

Howard S. Keep.

Pay as prohibition agent. Dismissed.

CASES PERTAINING TO REFUND OF TAXES DISMISSED BY THE COURT OF CLAIMS

On June 18, 1928

E–435. Trailmobile Company.
E–472. Trailmobile Company.
H–110. Trailmobile Company.
H–531. Republic Ry. & Light Co.
H–532. Pennsylvania-Ohio Electric Co.
H–533. New Castle & Lowell Ry. Co.
H–534. Mahoning County Light Co.
H–536. Pennsylvania Power Co.
H–537. H. A. Clarke et al., trustees.

On October 1, 1928

H–303. Ed. Rauh.
H–304. Jeanette Rauh.
H–524. Annie R. Bird et al.
J–190. Pepsin Syrup Co.

On October 4, 1928

D–876. Texas Pacific Coal & Oil Co.

On October 8, 1928

E–12. Charles E. S. Wood.
E–595. William C. Cannon.
F–108. Eldorado Coal & Mining Co.
F–136. Eugene Higgins.
F–274. Parsons Trading Co.
F–321. Providence Silk Hosiery Co.
H–30. Pittsburgh Coal Co.
H–50. Springfield Woolen Mills Co.
H–65. Alaska Pacific Construction Co.
H–69. Frances S. Holbrook et al.
H–128. Fidelity Warehouse Co.
H–132. Scandinavia Belting Co.
H–135. Western Shoe Co.
H–153. C. W. Marks Shoe Co.
H–157. Anderson, Dulin, Varnell.
H–158. George P. Pilling & Son Co.
H–164. Todd Shipyards Corporation.
H–283. Queen City Hoop Co.
H–316. Omnibus Corporation.
H–317. Motzorongo Co.
H–326. E. Guckenheim Bakers Supply Co.
H–511. Alexander, Botton & Lewis Insurance Agency.
H–518. MacAndrews & Forbes Co.
H–545. Hicks Company.
H–558. Mansfield Tire & Rubber Co.
J–34. Prest-O-Lite Co.
J–120. New Hampshire Securities Co.

On October 15, 1928

J–94. Leon Israel.
J–95. Achille F. Israel.
J–96. Sam Israel.
J–97. Mrs. Sam Israel.

On October 16, 1928

H–339. Ernest A. Goff.

On December 3, 1928

D–785. Universal Battery Co.
E–543. Samuel J. Kornhauser.
H–43. Saranac Machine Co.
H–68. Frances S. Holbrook et al.
H–191. The Number Eight Coal Co.
H–271. American Piano Co.
H–294. The Cliff Dwellers.
H–298. Southern Humboldt Lumber Co.
H–338. A. J. Johnson & Sons Furniture Co.
H–347. Bradlee & Company.
H–404. Doehler Die Casting Co. of New York.
H–405. Doehler Die Casting Co. of New Jersey.
H–408. Lewis S. Rosentiel.

H-452. Union Land & Timber Co.
H-468. Eby Shoe Co.
H-555. Frederic A. Delano.
J-47. Hunter Canal Co.
J-98. James C. Perry.
J-108. Yale & Towne Mfg. Co.
J-200. J. J. Stangel Hardware Co.
J-206. Wichita County Club Association.
J-208. Isabella G. Breckinridge.
J-209. Charles C. Goodrich.
J-292. George Lawley & Son Corporation.
J-573. National Life Ins. Co.

ON DECEMBER 4, 1928

J-193. Wyoming National Bank of Casper, Wyo.

ON DECEMBER 5, 1928

F-301. Mauney-Steel Co.

ON DECEMBER 10, 1928

H-35. Louis E. Stoddard, executor.
H-444. Rose P. Crane, executrix.
J-210. Rosenfeld Co.
J-328. Alexander L. Benachi.
J-329. Anthony E. Benachi.
J-330. Anthony L. Benachi.
J-331. Emanuel A. Benachi.
J-332. Constantine J. Choremi.
J-333. John D. Choremi.
J-334. John E. Lloyd.
J-335. Augustus T. Sinadino.
J-351. Anthony E. Benachi, trustee.

ON DECEMBER 11, 1928

F-365. Milan D. Fletcher.

ON DECEMBER 12, 1928

H-60. Guaranty Securities Co.

ON JANUARY 7, 1929

E-2. George M. Clarke, executor.
E-79. Ex-Cel Battery Works.
E-80. Campbell Electric Co.
E-81. Benj. Dubinski, etc.
E-82. Rainbow Battery Mfg. Co.
E-83. Lewis Heiman et al.
E-84. Lester C. Beals et al.
E-85. General Storage Battery Co.
E-86. Coliseum Battery Co.
E-87. Panama Rubber Co.
E-429. Geo. F. Dittman Boot & Shoe Co.
F-5. Morris & Co.
F-95. Richmond Dry Goods Co.
F-286. E. W. King Co.
F-393. Dayton Steel Foundry Co.
H-17. Louis Dejonge & Co.
H-33. Thomas E. McClintock, receiver.
H-72. Jones, Son & Co.
H-108. Central Stores Co.
H-131. L. J. Mutty Co.
H-176. Western Dry Goods Co.
H-194. Sharon Foundry Co.
H-217. Jacquard, Inc.
H-240. Evans Milling Co.
H-268. Amos R. Little et al.
H-276. Wrought Iron Range Co.
H-301. Greenbaum, Weil & Michels.
H-348. Champion Machine & Forging Co.
H-352. Cohn-Hall-Marx Co.
H-557. J. K. Orr Shoe Co.
J-27. Graham Paper Co.
J-39. R. McMillan Co.
J-51. Hafleigh & Co.
J-54. Barnes Drill Co.
J-99. Coca Cola Bottling Works.
J-186. Woodward & Lothrop.
J-192. Carson Securities Co.
J-246. Donovan Motor Car Co.
J-293. Rochester Ice Cream Co.
J-385. Jessie N. Hills, executrix, etc.

ON JANUARY 14, 1929

E-458. Atlanta Coca Cola Bottling Co.
E-459. Congers, Coca Cola Bottling Co.
E-460. Marietta Coca Cola Bottling Co.
E-470. Griffin Coca Cola Bottling Co.
E-484. Gainesville Coca Cola Bottling Co.
E-485. Salt City Bottling Co.
E-564. Crown Steam Bottling Works.
E-608. Charles Segelke & Son.
E-609. Henry-Brown Co.
F-2. L. F. Bellingrath.
F-10. P. J. Kohlman.
F-24. Coca-Cola Bottling Co. of Chicago.
F-27. Purity Bottling Works, etc.
F-28. Jonesboro Coca-Cola Bottling Co.
F-52. Beaumont Coca-Cola Bottling Co.
F-73. W. B. Conway.
F-74. Augusta Coca-Cola Bottling Co.
F-75. C. I. Smith.
F-83. Fred Huseman.
F-105. Texas Coca-Cola Bottling Co.
F-112. Roddy Mfg. Co.
F-118. J. & M. Ganghan.
F-121. Orange-Crush Bottling Co.
F-137. Brand Bottling Works.
F-161. Colfax Bottling Works.
F-171. Anaconda Products Co.
F-172. Bedford Bottling Works.
F-173. W. W. Yager.
F-191. F. A. Dickinson.
F-192. Hoffman Beverage Co.
F-193. J. Pabst Sons Co.
F-194. L. D. Peeler.
F-208. Jones Bottling Works.
F-209. Coca-Cola Bottling Co. of New York.
F-210. Coca-Cola Bottling Co. of New York.
F-255. A. D. Huesing.
F-256. Raleigh Pepsi-Cola Bottling Co.
F-273. John L. Weber, executor.
F-281. Savannah Coca-Cola Bottling Co.
F-282. Mansfield Coca-Cola Bottling Co.
F-283. Thomas Howard, sr.
F-316. Coca-Cola Bottling Co. of New York.
F-370. Coca-Cola Bottling Co.
F-383. Beasley Shoe Co.
F-387. H. L. Hoover.
F-397. Lime Cold Bottling Co.
F-399. Scott Meyer et al., trustees.
F-400. J. E. French Co.
H-15. Moore Grocery Co.
H-19. J. Albert & Son.
H-20. J. Albert & Son.
H-28. S. Waterbury & Son Co.
H-34. Hartz & Bahusen Co.
H-67. Perfection Mattress & Spring Co.
H-79. Raymond Cohn.
H-88. McPike Drug Co.
H-89. Lumberton Shoe Co.
H-102. H. E. Smith & Son.
H-113. John Grunholzer.
H-123. Arkansas Grocer Co.
H-124. Arkansas Grocer Co.
H-138. Bement Rea Co.
H-140. Herx & Eddy, Inc.
H-159. Ridenour-Baker Grocery Co.
H-165. C. H. Beasley & Bro.
H-172. Louisville Bedding Co.
H-175. Pennsylvania Bottling & Supply Co.
H-178. McLain Grocery Co.
H-179. McLain Grocery Co.
H-193. William Edwards Co.
H-195. Meyer Schmid Grocer Co.
H-196. Bement & Seitz Co.
H-220. A. Garside & Sons.
H-223. J. P. Smith Shoe Co.
H-233. Eureka Mower Co.
H-237. Brownsville Paper Co.
H-238. R. P. Smith & Son Co.
H-241. Houston Drug Co.
H-243. Ryley-Wilson Grocer Co.
H-245. Haynes-Henson Shoe Co.
H-246. Burr Printing House.
H-253. Amos James Grocer Co.
H-254. Littlefield & Steere Co.
H-265. Herman Bamberger Co.
H-273. Meyer Albert Grocer Co.
H-274. Norvell Chambers Shoe Co.
H-287. Webster Grocer Co.
H-289. John Kelly, Inc.
H-290. Geer Drug Co.
H-295. Ridenour Baker Mercantile Co.
H-311. Fox-Vliet Drug Co.
H-312. Fox-Vliet Drug Co.
H-313. Arkansas Grocery Co.
H-318. Milwaukee Shoe Co.
H-353. Krenning-Schlapp Grocer Co.
H-358. Orr Iron Co.
H-359. Orr Iron Co.
H-368. Rigney & Co.
H-369. Gunz-Durler Candy Co.

H-370. Gunz-Durler Candy Co.
H-373. J. F. Cloutman Shoe Co.
H-377. Pincus & Tobias, Inc.
H-378. Pincus & Tobias, Inc.
H-380. Warner-Jenkinson Mfg. Co.
H-381. Warner-Jenkinson Mfg. Co.
H-384. Beck & Corbitt Iron Co.
H-385. Beck & Corbitt Iron Co.
H-387. Krippendorf-Dittman Co. et al.
H-390. Omaha Baum Iron Store, Inc., et al.
H-392. Bristol Grocery Co.
H-393. Bristol Grocery Co.
H-406. Moore Shafer Shoe Mfg. Co.
H-424. Lane Brothers Co.
H-427. Port Huron Sulphite & Paper Co.
H-428. Greenwood Association.
H-429. Mebius & Drusscher Co.
H-451. Beasley Shoe Co.
H-465. Sandwich Mfg. Co.
H-479. Jonesboro Grocer Co.
H-489. Curtis & Jones Co.
H-497. Brockton Cooperative Boot Company.
H-519. Marshall Paper Co.
H-539. Kolliner-Newman Co.
H-553. Lavenson's, Inc.
H-559. Oakford & Fahnestock.
H-560. Oakford & Fahnestock.
H-562. Moore Grocery Co.
J-2. Orr Iron Co.
J-9. B. L. Marble Chair Co.
J-10. B. L. Marble Chair Co.
J-12. G. Edwin Smith Shoe Co.
J-21. Stone Tarlow Co., etc.
J-22. Brownville Paper Co.
J-23. Griggs Cooper & Co.
J-28. King Candy Co.
J-36. Neiman Marcus Co.
J-59. William E. Beck & Co.
J-86. Peder Iron & Steel Co.
J-90. George Blome & Son Co.
J-91. George Blome & Son Co.
J-101. R. C. Williams Georgia Corp.
J-109. Greene-Sloane & Co.
J-110. Wagner Hardware Co.
J-134. Portable Elevator Mfg. Co.
J-136. Vilter Mfg. Co.
J-137. Williams Hardware Co.
J-138. Williams Hardware Co.
J-202. Rothschild Bros. & Co., et al.
J-251. Roach, Tisdale & Co.
J-259. Richmond Dry Goods Co.
J-279. Brown-Wales Co.
J-287. F. W. Heitmann Co.

ON FEBRUARY 4, 1929

B-423. Lumber Manufacturers Inter-Insurance Association.
C-1264. Indemnity Exchange.
C-1265. Associated Employers Reciprocal.
C-1266. California Casualty Indemnity Exchange.
C-1267. Utilities Fire Exchange.
C-1268. Miller's Indemnity Underwriters.
C-1269. Hardware Exchange.
C-1270. Retail Lumbermen's Inter-Insurance Exchange.
C-1271. Lumbermen's Reciprocal Association.
C-1272. Associated Employers Reciprocal, etc.
C-1273. United Retail Merchants' Underwriting Association.
C-1274. Utilities Indemnity Exchange.
C-1275. Casualty Indemnity Exchange.
C-1276. Druggist's Indemnity Exchange.
D-13. New York Reciprocal Underwriters.
D-14. American Exchange Underwriters.
D-15. Individual Underwriters, etc.
D-16. North American Inter-Insurers.
E-603. Stanley Resor.
F-6. John P. Parsons.
F-7. Helen Resor.
F-53. Josephine S. Goodwin.
F-99. Staunton Coca-Cola Bottling Works.
F-164. Samuel Hunter Richey.
F-197. Gilbert Kinney.
F-270. Petersburg Coca-Cola Bottling Works.
F-271. Washington Coca-Cola Bottling Works.
F-272. Coca-Cola Bottling Works, Richmond, Va.
F-302. Riverside Mfg. Co.
F-352. Berkshire Woolen Co.
H-231. Ennis Coal Co.
H-351. Hershey Mfg. Co.
H-401. Missouri Cattle Loan Co.
H-413. John P. Parsons.
H-420. Walter G. Resor.
H-546. Stanley Resor.
H-547. Helen Resor.
H-548. Charles E. Raymond.
H-549. Harry E. Ward.

H-551. Samuel Powell Griffiths.
J-4. Henry T. Stanton.
J-5. John P. Parsons.
J-52. Walter G. Resor.
J-53. James W. Young.
J-56. Raleigh Real Estate & Trust Co.
J-57. Trinity Cotton Oil Co.
J-63. Gilbert Kinney.
J-64. Stuart D. Cowan.
J-65. Colonial Savings & Loan Co.
J-121. George A. Dascomb et al.
J-176. American Rattan & Reed Mfg. Co.
J-256. Samuel Hunter Richey.
J-257. Gilbert Kinney.
J-258. James W. Young.
J-265. Charles E. Raymond.
J-266. Stuart D. Cowan.
J-267. Walter G. Resor.
J-314. Lusskey, White & Coolidge, Inc.
J-379. Marcus & Co.
J-380. E. M. Gattle & Co.
J-381. Walter Eitelbach & Co.
J-384. Howard Paper Co.
J-449. Adams Mining Co.
J-450. Alabama Steel & Shipbuilding Co.
J-451. Alpha Ore Co.
J-452. American Bridge Co.
J-453. American Mining Co.
J-454. American Sheet & Tin Plate Co.
J-455. American Steel & Wire Co. of Ala.
J-456. American Steel & Wire Co. of N. J.
J-457. Apollo Gas Co.
J-458. Auburn Iron Co.
J-459. Bessemer Electric Power Co.
J-460. Bessemer & Lake Erie R. R. Co.
J-461. Birmingham Southern R. R. Co.
J-462. Carnegie Land Co.
J-465. Chapin Mining Co.
J-466. Chicago, Lake Shore & Eastern Ry. Co.
J-467. Clairton Steel Co.
J-468. Columbus Stone Co.
J-469. Connellsville & Monongahela Ry. Co.
J-470. Donora Mining Co.
J-471. Donora Zinc Co.
J-472. Duluth, Missabe & Northern Ry. Co.
J-473. Duluth & Iron Range R. R. Co.
J-474. Edgar Zinc Co.
J-475. Elgin, Joliet & Eastern Ry. Co.
J-476. Elwood, Anderson & Lapell R. R. Co.
J-477. Etna & Montrose R. R. Co.
J-478. Fayal Iron Co.
J-479. Federal Steel Co.
J-480. Franklin Township Water Co.
J-481. H. C. Frick Coke Co.
J-482. Gary Heat, Light & Water Co.
J-483. Girard Land Co.
J-484. Hostetter-Connellsville Coke Co.
J-485. Illinois Steel Co.
J-486. Illinois Steel Warehouse Co.
J-487. Indiana Steel Co.
J-488. Interstate Transfer Ry. Co.
J-489. Johnstown & Stony Creek R. R. Co.
J-490. Joliet & Blue Island Ry. Co.
J-491. Lake Superior Consolidated Iron Mines.
J-492. Lorain Iron Mining Co.
J-493. Lorain Steel Co.
J-494. McKeesport Connecting R. R. Co.
J-495. Minnesota Iron Co.
J-496. Minnesota Steel Co.
J-497. Missabe & Northern Townsite Co.
J-498. Morgan Park Co.
J-499. Mountain Iron Co.
J-500. Mt. Pleasant Water Co.
J-501. National Mining Co.
J-502. National Tube Co.
J-503. National Tube Co.
J-504. Neville Iron Mining Co.
J-505. Oliver Iron Mining Co.
J-506. J. C. Pearson Co.
J-507. Pittsburgh, Bessemer & Lake Erie R. R. Co.
J-508. Pittsburgh Steamship Co.
J-509. Pittsburgh & Conneaut Dock Co.
J-510. Pittsburgh & Ohio Valley Ry. Co.
J-511. Proctor Water & Light Co.
J-512. Rathbun Iron Mining Co.
J-513. Republic Connellsville Coke Co.
J-514. St. Clair Limestone Co.
J-515. St. Clair Terminal R. R. Co.
J-516. Scully Steel & Iron Co.
J-517. Security Land & Exploration Co.
J-518. Sewickley Water Co.
J-519. Sharon Coal & Limestone Co.
J-520. Sharon Coke Co.

J-521. Sharon Connecting R. R. Co.
J-522. Sharon Land Co.
J-523. Sharon Ore Co.
J-524. Sharon Tin Plate Co.
J-525. Shelby Steel Tube Co.
J-526. Spirit Lake Transfer Ry. Co.
J-527. Standard Water Co.
J-528. Tennessee Coal, Iron & R. R. Co.
J-529. Trotter Water Co.
J-530. Union R. R. Co.
J-531. Union Steel Co.
J-532. Union Supply Co.
J-533. U. S. Coal & Coke Co.
J-534. U. S. Fuel Co.
J-536. U. S. Steel Products Co.
J-537. U. S. Supply Co.
J-538. Universal Portland Cement Co.
J-539. Winthrop Iron Co.
J-540. Youghiogheny Northern Ry. Co.
J-583. Star Union Brewing Co.
J-624. Nelson Knitting Co.
J-636. H. K. Porter Co.

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CASES DISMISSED BY THE COURT OF CLAIMS PERTAINING TO TRANSPORTATION FURNISHED THE GOVERNMENT BY COMMON CARRIERS

ON OCTOBER 1, 1928

B-76. Oregon Short Line R. R. Co.
C-1000. Mississippi Central R. R. Co.
F-199. Southern Pacific Co.

ON OCTOBER 8, 1928

A-36. Arizona Eastern R. R. Co.
A-50. James A. Baker, receiver.
A-278. El Paso & Southwestern Co. et al.
B-66. El Paso & Southwestern Co. et al.
B-186. Galveston, Harrisburg & San Antonio Ry. Co.

ON OCTOBER 15, 1928

B-206. Louisville & Nashville R. R. Co.

ON DECEMBER 3, 1928

B-117. Lehigh Valley R. R. Co.
B-151. New York Central R. R. Co.
B-153. Denver & Rio Grande Western R. R. Co.
B-169. Erie R. R. Co.
C-39. Wabash Ry. Co.

ON DECEMBER 10, 1928

C-125. Macon, Dublin & Savannah R. R. Co.

CASES PERTAINING TO FEDERAL CONTROL OF RAILROADS DISMISSED BY THE COURT OF CLAIMS

ON OCTOBER 22, 1928

D-107. Colorado & Southeastern R. R. Co.

D-345. Cripple Creek & Colorado Springs R. R. Co.

D-406. Central West Virginia & Southern R. R. Co.

D-407. South Brooklyn Ry. Co.

E-409. Tonopah & Tidewater R. R. Co.

E-410. Louisiana & Pacific Ry. Co.

CASES PERTAINING TO PAY AS CANDIDATE FOR COMMISSION, UNITED STATES ARMY, DISMISSED BY THE COURT OF CLAIMS

ON OCTOBER 8, 1928

D-1029. Harold M. Easley.

ON DECEMBER 3, 1928

D-971. Hugh J. Kinsman.
D-973. Gerald W. O'Conner.
D-995. Joseph H. Colman.
D-1061. Louis W. Smith.
E-195. James N. Senecal.

ON JANUARY 7, 1929

D-967. Carroll O. Stauffer.
D-986. Walter A. Helms.
E-24. Thomas B. Jackson.
E-245. Richard E. Booth.
E-276. William B. Waterman.
E-299. John C. Robbins.
E-509. Theodore S. Maerker.

ON FEBRUARY 4, 1929

F-300. Frank H. Rivers.

CASES PERTAINING TO LOSS ON COTTON LINTERS UNDER CONTRACTS WITH THE UNITED STATES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PLAINTIFF

ON DECEMBER 3, 1928

D-1066. Arcola Oil Mill.
D-1067. Broussard Oil Mill.
D-1068. W. H. Coyle Co.
D-1069. Eutaw Oil Mill.
D-1070. Gainesville Cotton Oil Co.
D-1071. Greenville Cotton Oil Co.
D-1072. Hugo Cotton Oil Co.
D-1073. Ladonia Cotton Oil Co.
D-1074. Lafayette Cotton Oil Mill.
D-1075. Merchants & Planters Oil Co.
D-1076. Mintz Oil Mill.
D-1077. Peoples Cotton Oil Co.
D-1078. B. C. Roberts, trustee, etc.
D-1079. Planters Cotton Oil Co.
D-1080. Planters Oil & Fertilizer Co.
D-1081. Riverside Cotton Oil Co.
D-1082. Russell Coleman Oil Mill.
D-1085. Belton Oil Co.
D-1086. Chatham Oil & Fertilizer Co.
D-1087. Citizens Cotton Oil Co.
D-1088. Consumers Cotton Oil Co.
D-1089. Cooper Cotton Oil Co.
D-1090. Civington Cotton Oil Co.
D-1091. Drew Oil Mills.
D-1092. Haleyville Mill & Gin Co.
D-1093. King Lumber & Mill Co.
D-1094. Laurinburg Oil Co.
D-1095. Leland Oil Works.
D-1096. Mt. Calm Cottonseed Oil Co.
D-1097. Peoples Cotton Mill Co.
D-1098. Pine Level Mill Co.
D-1099. Planters Cotton Oil Co.
D-1100. Port Gibson Oil Co.
D-1101. Prosperity Cotton Oil Mill Co.
D-1102. Powell Oil Mill Co.
D-1103. Rosebud Oil & Cotton Co.
D-1104. Texas Refining Co.
D-1105. Whittewright Oil Mill Co.
D-1107. Farmers Cotton Oil & Fertilizer Co.
D-1108. New Roads Oil & Mfg. Co.
D-1109. Southland Cotton Oil Co.
D-1110. Willmont Oil Mills.
D-1111. Vernon Cotton Oil Co.
D-1116. Plano Cōtton Oil Mill.
D-1117. Fitzgerald Cotton Oil Co.

CLAIMS FOR DIFFERENCE IN PAY BETWEEN THIRD AND FOURTH PERIODS, NAVY, DISMISSED BY THE COURT OF CLAIMS

ON FEBRUARY 4, 1929

J-111. Walter P. Day.
J-302. Max Baum.
J-303. Frederick C. Beck.
J-304. Verne V. Boggs.
J-305. James E. Brennen.
J-306. Arthur M. Bryan.
J-307. Thomas P. Bryan.
J-308. Ray W. Byrns.
J-309. Guild Bruda.
J-310. Charles A. Cameron.
J-311. John B. Daniels.
J-318. Golden F. Davis.
J-319. Edward H. Duane.
J-320. Harvey R. Dye.
J-321. Joseph E. Ford.
J-322. Edison H. Gale.
J-323. Harry E. Gross.
J-324. Maurice S. Hirshorn.
J-325. James E. Hunt.
J-326. Leonard A. Klauer.
J-327. Fillmore S. C. Layman.
J-338. Frank J. Manley.
J-339. Percy W. McCord.
J-340. Palmer J. McCloskey.
J-341. Henry E. McGinnis.
J-342. Edward Mixon.
J-343. Walter E. Morton.
J-344. Chris Norstad.
J-345. Alvin S. Reid.
J-346. Don M. Robinson.
J-347. Maurice T. Scanlon.
J-348. Michael A. Sprangel.
J-349. James H. Stevens.
J-353. George P. Smallman.
J-354. Theodore M. Stock.
J-355. George C. Tasker.
J-356. John M. Theis.
J-357. Isaac W. Thompson.
J-358. James D. G. Wognum.
J-359. William E. Woods.
J-360. Tipton F. Woodward.
J-361. Dillon F. Zimmerman.
J-392. Irving B. McDaniel.
J-393. Olem Harris Cogdon.
J-394. Harry L. Hilton.
J-395. Cornelius V. X. Knox.
J-396. Raymond D. MacCart.
J-397. George T. Paine.
J-398. William A. Sullivan.
J-399. George V. Whittle.
J-400. Richard W. Hughes.
J-401. Louis Irverson.
J-402. Robert J. Lawler.
J-403. Roy J. Leutsker.
J-404. Aclpfar A. Marsteller.
J-405. Edward H. Sparkman, jr.
J-406. Ernest Ward.
J-433. Gordon S. Bower.
J-434. George R. Brooke.
J-435. William F. Crouse.
J-436. Louis E. Fitzsimmons.
J-437. Clarence E. Kastenbein.
J-438. Roland G. Mayer.
J-439. James E. Sanner.
J-440. Francis P. Field.
J-558. Charles F. Behrens.
J-559. William W. Hastings.
J-631. Houston B. Fite.

ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

E. W. BLISS CO. v. UNITED STATES

[61 C. Cls. 777; 275 U. S. 509]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *reversed*, with directions to make further findings, to allow amendments of pleadings, and render judgment thereon.

WILLIAM R. VERNER, EXECUTOR v. UNITED STATES

[62 C. Cls. 574; 275 U. S. 524]

Petition for writ of certiorari *denied* by the Supreme Court October 10, 1927.

JOHN D. CHAPMAN v. UNITED STATES

[63 C. Cls. 106; 275 U. S. 524]

Petition for writ of certiorari *denied* by the Supreme Court October 10, 1927.

J. F. McMURRAY v. CHOCTAW NATION AND CHICKASAW NATION OF INDIANS

CHOCTAW NATION AND CHICKASAW NATION OF INDIANS v. J. F. McMURRAY

[62 C. Cls. 458; 275 U. S. 524]

Petitions for writs of certiorari *denied* by the Supreme Court October 10, 1927.

DETROIT STEEL PRODUCTS CO. v. UNITED STATES

[62 C. Cls. 686; 275 U. S. 525]

Petition for writ of certiorari *denied* by the Supreme Court October 10, 1927.

SISSETON AND WAHPETON BANDS OF SIOUX INDIANS v. UNITED STATES

[58 C. Cls. 302; 275 U. S. 528]

Petition for writ of certiorari *denied* by the Supreme Court October 10, 1927. (See *post*, p. 767.)

CARRIE HOWARD STEEDMAN ET AL. v. UNITED STATES

[63 C. Cls. 226; 275 U. S. 528]

Petition for writ of certiorari *denied* by the Supreme Court October 10, 1927.

JOSEPH S. WILLIAMS ET AL. v. UNITED STATES

[63 C. Cls. 668; 275 U. S. 539]

Petition for writ of certiorari *denied* by the Supreme Court October 24, 1927.

CHICAGO, BURLINGTON & QUINCY R. R. CO. v. UNITED STATES

[63 C. Cls. 83; 275 U. S. 541]

Petition for writ of certiorari *denied* by the Supreme Court October 24, 1927.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO. v. UNITED STATES

[63 C. Cls. 137; 275 U. S. 541]

Petition for writ of certiorari *denied* by the Supreme Court October 24, 1927.

PITTSBURGH HOTELS CO. v. UNITED STATES

[63 C. Cls. 475; 275 U. S. 546]

Petition for writ of certiorari *denied* by the Supreme Court October 31, 1927.

FRANK P. BLAIR v. UNITED STATES

[63 C. Cls. 193; 275 U. S. 546]

Petition for writ of certiorari *denied* by the Supreme Court October 31, 1927.

CHIMNEY ROCK CO. v. UNITED STATES

[63 C. Cls. 660; 275 U. S. 552]

Petition for writ of certiorari *denied* by the Supreme Court November 21, 1927.

Syllabus

CENTRAL UNION TRUST CO. OF NEW YORK ET AL. v. UNITED STATES

[63 C. Cls. 619; 275 U. S. 555]

Petition for writ of certiorari *denied* by the Supreme Court November 21, 1927.

THOMAS M. ADAMS v. UNITED STATES

[60 C. Cls. 319; 275 U. S. 573]

On appeal. *Dismissed* by the Supreme Court October 3, 1927, per stipulation of counsel.

UNITED STATES v. UNITED CIGAR STORES CO. OF AMERICA

[62 C. Cls. 134; 275 U. S. 576]

On writ of certiorari. *Dismissed* by the Supreme Court October 31, 1927, on motion of the United States.

CHICAGO CHEESE & FARM PRODUCTS CO. v. UNITED STATES

[63 C. Cls. 648; 275 U. S. 577]

Petition for writ of certiorari *dismissed* by the Supreme Court January 3, 1928, on motion of petitioner.

UNITED STATES v. DAVID R. J. ARNOLD, ADMINISTRATOR

[62 C. Cls. 439; 275 U. S. 578]

On writ of certiorari. *Dismissed* by the Supreme Court July 5, 1927, pursuant to 32d rule.

Syllabus

KORNHAUSER v. UNITED STATES

[62 C. Cls. 647; 276 U. S. 145]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

Claimant successfully defended an accounting suit brought by his former law partner respecting shares of stock which claimant had received for professional services, performed by him, as the partner alleged, during the existence of the partnership, or, as claimant maintained, after its termination. *Held* that, in computing claimant's net income under the revenue act of 1918, the attorney's fees paid by him in defense of the suit were deductible from gross income, not as a loss under section 214 (a) (4), but as an "ordinary and necessary expense" incurred in carrying on a business, under section 214 (a) (1); that it was not within section 215, forbidding deduction of "personal, living, or family expenses."

MR. JUSTICE SUTHERLAND delivered the opinion of the Supreme Court February 20, 1928.

UNITED STATES v. MAGNOLIA PETROLEUM CO.

[63 C. Cls. 173; 276 U. S. 160]

Judgment was rendered against the United States in the court below. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

1. Section 1019 of the revenue act of 1924, which provides that interest on a refund of any internal revenue tax erroneously or illegally assessed or collected shall be allowed from the date when the tax was paid, can not be construed retroactively as substituting that basis of interest recovery for the basis in the act of 1921, as to refunds which had been allowed under the earlier act but not computed or paid when the later act was passed.
2. This conclusion is not affected even if it be assumed that the interest allowed by the earlier act was not within the saving clause accompanying the repeal of that act by the later one, a question not here raised and therefore not considered.

Syllabus

3. Save as given by Congress, there was no right to the interest.
4. Under section 1324 (a), subdivision (1), act of 1921, a claimant is not entitled to interest from the time when the tax was paid if the protest accompanying the payment gave no information and stated nothing that would aid in determining whether an overassessment had been made.

Mr. JUSTICE BUTLER delivered the opinion of the Supreme Court February 20, 1928.

GOODYEAR TIRE & RUBBER CO. v. UNITED STATES

[62 C. Cls. 370; 276 U. S. 287]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

1. A lease to the United States for a term of years, made without any specific authority of law, and entered into when there was no appropriation available for the payment of rent after the first fiscal year, does not bind the Government after that year. Rev. Stats. sections 3732, 3679. *Leiter* v. *United States*, 271 U. S. 204.
2. To make such a lease binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year.
3. Holding over by Government officials after the fiscal year, accompanied by a manifestation of their intention not to bind the United States to pay rent beyond the period of actual occupancy, will not work a renewal for the whole of the ensuing fiscal year even where there is an appropriation covering rent for that year, and although, under the State law a private lessee holding over would be bound to a year's renewal by legal implication regardless of his intention.
4. The right to sue the United States under the Tucker Act on a claim founded on contract, must rest upon an express contract or one implied in fact; the act gives no right of action in a case where, if the transaction were between private parties, a recovery could be had upon a contract implied in law.

Mr. JUSTICE SANFORD delivered the opinion of the Supreme Court March 12, 1928.

HUMES ET AL. v. UNITED STATES

[63 C. Cls. 613; 276 U. S. 487]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

Under section 403 (a) (3) of the revenue act of 1918, which provides that bequests to charitable corporations may be deducted in determining the net estate subject to estate tax, a contingent bequest the value of which can not be determined from any known data but depends on mere speculation, is not deductible.

Mr. JUSTICE BRANDEIS delivered the opinion of the Supreme Court April 9, 1928.

FRED M. KIRBY v. UNITED STATES

[62 C. Cls. 706; 276 U. S. 593]

Judgment was rendered in favor of the United States in the court below. Upon certiorari it was decided:

Per curiam: Affirmed on the authority of (1) *Mason* v. *Routzahn*, 275 U. S. 175; (2) *United States* v. *Anderson*, 269 U. S. 422, 443.

Decided February 20, 1928.

P. DERONDE & CO. v. UNITED STATES

[63 C. Cls. 665; 276 U. S. 620]

Petition for writ of certiorari *denied* by the Supreme Court February 20, 1928.

NATIONAL CITY BANK OF SEATTLE v. UNITED STATES

[64 C. Cls. 236; 276 U. S. 620]

Petition for writ of certiorari *denied* by the Supreme Court February 20, 1928.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO v. UNITED STATES

[63 C. Cls. 485; 276 U. S. 622]

Petition for writ of certiorari *denied* by the Supreme Court February 27, 1928.

WYANDOTTE TERMINAL R. R. CO. v. UNITED STATES

[64 C. Cls. 329; 276 U. S. 630]

Petition for writ of certiorari *denied* by the Supreme Court March 12, 1928.

ANNA LOUISE NOLDE v. UNITED STATES

[64 C. Cls. 204; 276 U. S. 634]

Petition for writ of certiorari *denied* by the Supreme Court April 9, 1928.

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION CO. v. UNITED STATES

SAME v. SAME

ATLAS LINE STEAMSHIP CO. v. UNITED STATES

[59 C. Cls. 461; 277 U. S. 138]

Judgments were rendered in favor of the United States in the court below. On appeal the judgments were *reversed*, the Supreme Court deciding:

1. Under the trading with the enemy act of October 6, 1917, section 2, property in this country owned by a domestic corporation was nonenemy property even though an enemy owned all of its stock.
2. Where property of a domestic corporation whose stock was enemy owned was taken over during the war and the compensation fixed by the President was paid, interest on the sum paid is

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not recoverable from time of taking to time of payment, in the absence of anything showing that due allowance for the delay was not made in fixing the compensation.

3. Petitions in these cases alleging taking and use of plaintiffs' property by the United States state causes of action but should be made more definite and certain by amendment.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Supreme Court May 14, 1928.

SISSETON AND WAHPETON BANDS OF SIOUX INDIANS v. UNITED STATES

[58 C. Cls. 302; 277 U. S. 424]

Judgment was rendered in favor of the United States in the court below. On appeal the judgment was *affirmed*, the Supreme Court deciding:

1. The act of March 4, 1927, granting the appellants in this case one year within which to "appeal," was intended to confer the right of appeal as distinguished from the right to petition for certiorari conferred by the jurisdictional act of February 13, 1925.
2. The act of April 11, 1916, which provides "that all claims of whatsoever nature which the Sisseton and Wahpeton bands of Sioux Indians may have or claim to have against the United States shall be submitted to the Court of Claims * * * for the amount due or claimed to be due said bands from the United States under any treaties or laws of the United States," and which confers jurisdiction upon that court "to hear and determine all claims of said bands against the United States," etc., is not to be construed as authorizing the court to render a judgment for the Indians contrary to express provisions of the treaties and statutes involved, upon the ground that such provisions were induced by mistake of fact or were not understood by individual members of the bands when adopted.

   So *held* respecting:

   (1) A claim for the difference between the amount received by the Indians under an act of March 2, 1861, for lands north of the Minnesota River, at 30 cents per acre—the allowance fixed by the Senate in 1860 pursuant to a treaty of 1858—and the amount they would have received at $1.25 per acre—the price at which their lands south of the river were sold under an act of March 3, 1863, and which the court below found to be

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their value at that time; the claim resting on the argument that the northern lands must also have been worth the larger price in 1860, and that they must have been undervalued through a mistake of the parties.

(2) A claim for additional compensation for land in Dakota Territory which had been ceded by the Indians and paid for by the United States under an agreement ratified by Congress (act of Feb. 14, 1873), the claim being based on the fact that, through a material mistake of the parties, the area involved was underestimated by three million acres, and the amount of the claim being for a corresponding addition to the amount agreed to and paid.

(3) A claim for the full principal amount of a trust fund set apart by treaty (July 23, 1851) in consideration of a cession of lands to the Government, and which had been paid, pursuant to the treaty, by payment of interest at 5% for a period of fifty years; the basis of the claim being that such a trust obligation could not be discharged by such payments, and that the treaty was misunderstood by some of the Indians—not the representatives who negotiated it—as providing for payment of the principal also at the end of the fifty-year period.

3. An act of March 3, 1863, following a Sioux Indian outbreak, directed the President to set aside for the Sisseton and Wahpeton bands, lands sufficient to provide each member willing to adopt the pursuit of agriculture with 80 acres of agricultural land. *Held*, (1) that recovery for failure to fulfill this obligation would require a finding of how many of the Indians were willing to follow such pursuit; (2) that the act was not intended for the benefit of those who did not avail themselves of it because they were then in open hostility to the Government.

4. Jurisdiction over Indians and their tribal lands belongs to Congress and can not be exercised by the courts in the absence of legislation conferring such rights as are subject to judicial cognizance.

Mr. JUSTICE STONE delivered the opinion of the Supreme Court, May 28, 1928. (See *ante*, p. 760.)

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NATIONAL LIFE INSURANCE CO. v. UNITED STATES

[63 C. Cls. 256; 277 U. S. 508]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

The revenue act of 1921 provides that the gross income of a life insurance company shall be the gross amount of income received during the taxable year from interest, dividends, and rents, and that the net income upon which its income tax is to be assessed shall be the gross income less specified deductions, among which are (1) the amount of interest received during the taxable year from tax-exempt securities, and (2) an amount equal to 4% of the company's mean reserve funds, diminished, however, by the amount of the first deduction, the interest from tax-exempt securities. In the case at bar the petitioner company, though allowed the first deduction, comprising the interest from its exempt State, municipal, and United States bonds, was not advantaged thereby; for, since the same amount was subtracted in computing the second deduction, its tax was the same as if all of its securities had been taxable, and higher than it would have been if those that were tax-free had not belonged to it. The act (section 213) expressly disavows any purpose to tax interest upon obligations of the United States, and provides (section 1403) that if any of its provisions or the application thereof to any persons or circumstances be held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby. *Held:*

1. The effect of the statutory computation of deductions was to impose a direct tax on the income of the exempt securities, amounting to taxation of the securities themselves.
2. The tax, in so far as it affects State and municipal bonds, was unconstitutional.
3. The tax, in so far as it affects the United States bonds, was contrary to the manifest general purpose of the statute, which (section 213) expressly disavowed any purpose to tax interest on such obligations and did not intend to subject them to burdens which could not be imposed on State obligations.

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4. Considering this, and the saving clause, abatement of the 4% deduction by the amount of interest received from tax-exempt securities can not be given effect against the petitioner, under the circumstances disclosed; and petitioner is entitled to recover taxes paid.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Supreme Court June 4, 1928.

WILLIAMSPORT WIRE ROPE CO. v. UNITED STATES

[63 C. Cls. 463; 277 U. S. 551]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

1. The power of the Commissioner of Internal Revenue in determining whether a corporation is entitled, under section 327 (a) and (b) of the revenue act of 1918, to have its war and excess-profits taxes fixed by a special assessment under section 328 by a comparison with the taxes of other representative corporations engaged in a like or similar trade or business, is discretionary in character; and the power of the Board of Tax Appeals in reviewing such determination under the revenue act of 1924 is likewise discretionary, and executory, in character.
2. Under the act of 1918, the Court of Claims, in a suit to recover taxes alleged to have been illegally collected, was without jurisdiction to review a determination of the commissioner refusing a special assessment under sections 327 and 328; nor was such jurisdiction conferred on that court as the result of the provision made in the act of 1924 for review of the commissioner's determination by the Board of Tax Appeals.

Mr. JUSTICE BRANDEIS delivered the opinion of the Supreme Court June 4, 1928.

UNITED STATES v. NICHOLS ET AL., EXECUTORS

[64 C. Cls. 241; 277 U. S. 584]

Petition for writ of certiorari *denied* by the Supreme Court April 16, 1928.

KOHLMAN, TRUSTEE, v. UNITED STATES

[63 C. Cls. 604; 277 U. S. 584]

Petition for writ of certiorari *denied* by the Supreme Court April 16, 1928.

LUCKENBACH STEAMSHIP CO. ET AL. v. UNITED STATES

[64 C. Cls. 59; 277 U. S. 584]

Petition for writ of certiorari *denied* by the Supreme Court April 16, 1928.

OCEAN STEAMSHIP CO. v. UNITED STATES

[64 C. Cls. 98; 277 U. S. 584]

Petition for writ of certiorari *denied* by the Supreme Court April 16, 1928.

CHEVROLET MOTOR CO. v. UNITED STATES

[64 C. Cls. 211; 277 U. S. 585]

Petition for writ of certiorari *denied* by the Supreme Court April 16, 1928.

COMPAGNIE GÉNÉRALE TRANSATLANTIQUE v. UNITED STATES

[64 C. Cls. 119; 277 U. S. 585]

Petition for writ of certiorari *denied* by the Supreme Court April 16, 1928.

PRICE v. UNITED STATES

[65 C. Cls. 91; 277 U. S. 587]

Petition for writ of certiorari *denied* by the Supreme Court April 16, 1928.

CITY OF CAPE MAY v. UNITED STATES

[64 C. Cls. 407; 277 U. S. 588]

Petition for writ of certiorari *denied* by the Supreme Court April 23, 1928.

RODMAN CHEMICAL CO. ET AL. v. UNITED STATES

[65 C. Cls. 39; 277 U. S. 592]

Petition for writ of certiorari *denied* by the Supreme Court May 14, 1928.

CORTEZ OIL CO. v. UNITED STATES

[64 C. Cls. 390; 277 U. S. 600]

Petition for writ of certiorari *denied* by the Supreme Court May 28, 1928.

PORTSMOUTH HARBOR LAND & HOTEL CO. ET AL. v. UNITED STATES

[64 C. Cls. 572; 277 U. S. 603]

Petition for writ of certiorari *denied* by the Supreme Court June 4, 1928.

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LEATHER ET AL. v. UNITED STATES

[64 C. Cls. 698; 277 U. S. 604]

Petition for writ of certiorari *denied* by the Supreme Court June 4, 1928.

YANKTON SIOUX TRIBE OF INDIANS v. UNITED STATES

[65 C. Cls. 427; 277 U. S. 607]

Petition for writ of certiorari *denied* by the Supreme Court June 4, 1928.

ATLAS LINE STEAMSHIP CO. v. UNITED STATES

[59 C. Cls. 974; 277 U. S. 609]

Appeal *dismissed* by the Supreme Court April 16, 1928, on motion of appellant.

NORTH GERMAN LLOYD v. UNITED STATES

SAME v. SAME

SAME v. SAME

[59 C. Cls. 460, 974; 277 U. S. 609, 610]

Appeal *dismissed* by the Supreme Court April 16, 1928, on motion of appellant.

HAMBURG-AMERICAN LINE v. UNITED STATES

SAME v. SAME

SAME v. SAME

[59 C. Cls. 974; 277 U. S. 610]

Appeal *dismissed* by the Supreme Court April 16, 1928.

DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS GESELLSCHAFT v. UNITED STATES

[59 C. Cls. 450; 277 U. S. 610]

Appeal *dismissed* by the Supreme Court April 16, 1928, on motion of appellant.

RHEDEREI M. JEBSEN CO. v. UNITED STATES

[59 C. Cls. 462; 277 U. S. 610]

Appeal *dismissed* by the Supreme Court April 23, 1928, on motion of appellant.

THE FIRM OF M. JEBSEN, ETC., ET AL. v. UNITED STATES

[59 C. Cls. 974; 277 U. S. 611]

Appeal *dismissed* by the Supreme Court April 23, 1928, on motion of appellants.

UNITED STATES v. CAMBRIDGE LOAN & BUILDING CO.

[63 C. Cls. 631; 278 U. S. 55]

Judgment was rendered against the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

1. A corporation which by the law of its State is a building and loan association, and the business of which is conducted in accordance with that law, is a "building and loan association" within the meaning of sections 231 of the revenue acts of 1918 and 1921, granting exemption from income tax, if its operations be not so related to mere money-making as to constitute a gross abuse of the name.

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2. The activities of the respondent in the way of receiving deposits on interest and making loans to persons not among its members (borrowers being required since the act of 1921, *supra*, to purchase from one to five shares of its stock) did not disqualify it for the tax exemption.
3. The act of 1921, *supra*, in confining the exemption to building and loan associations "substantially all of the business of which is confined to making loans to members," did not limit loans to the amount of shares subscribed for.
4. An act directing that certain taxes be refunded as "illegally collected" is an interpretation of the prior act under which they were exacted and by implication approves decisions of the Federal courts holding the exaction unwarranted.

Mr. JUSTICE HOLMES delivered the opinion of the Supreme Court November 19, 1928.

UNITED STATES v. LENSON

[63 C. Cls. 420; 278 U. S. 60]

Judgment was rendered against the United States in the court below. Upon certiorari the judgement was ***reversed***, the Supreme Court deciding:

Under the act of June 10, 1922, a lieutenant of the Staff Corps of the Navy, who has served for fifteen years as enlisted man, warrant officer, and commissioned officer, and whose first appointment to the permanent service was as a lieutenant, junior grade, of the Staff Corps, corresponding to a first lieutenant in the Army, is not entitled to pay of the fourth period if his total commissioned service does not equal that of a lieutenant commander of the line of the Navy drawing the pay of that period.

Mr. JUSTICE HOLMES delivered the opinion of the Supreme Court November 19, 1928.

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LASH'S PRODUCTS CO. v. UNITED STATES

[64 C. Cls. 252; 278 U. S. 175]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

1. The tax imposed by section 628 of the revenue act of 1918 on soft drinks sold by the manufacturer in bottles, etc., "equivalent to 10 per centum of the price for which so sold," is a tax on the manufacturer alone which, accurately speaking, can not be "passed on" to the purchaser.
2. Where a manufacturer sold such goods at his regular prices plus 10% added to cover the tax and not separately billed, and the purchasers, being notified of the arrangement, paid the whole, the tax payable by the manufacturer was properly computed on the total amount so paid by the purchasers.

Mr. JUSTICE HOLMES delivered the opinion of the Supreme Court January 2, 1929.

BOTANY WORSTED MILLS v. UNITED STATES

[63 C. Cls. 405; 278 U. S. 282]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

1. No compromise of tax claims is authorized by sec. 3229 Rev. Stats. which is not assented to by the Secretary of the Treasury.
2. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.
3. The taxpayer filed a return of its net income for 1917 under the revenue act of 1916, and paid a tax computed on the basis of this return. An audit of the taxpayer's books disclosed the necessity of an additional assessment, and after much correspondence and numerous conferences with subordinate officials of the Bureau of Internal Revenue, an amended return, based upon the figures agreed upon in the conferences, was filed by the taxpayer and an additional assessment made on the basis of the amended return. The Secretary of the Treasury did not consent to this settlement and no opinion of the Solicitor of Internal Revenue was filed in the office of the commissioner.

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The taxpayer paid the additional tax and then sued to recover part of it back as having been illegally collected. *Held:*

(1) That the informal settlement did not constitute a binding agreement.

(2) That the taxpayer was not estopped by the settlement from recovering any portion of the tax to which it might otherwise have been entitled.

4. In a suit to recover taxes alleged to have been illegally collected, the burden of proving the illegality rests upon the taxpayer.
5. Extraordinary, unusual, and extravagant amounts paid by a corporation to its officers in the guise and form of compensation for their services, but having no substantial relation to the measure of their services and being utterly disproportioned to their value, are not in reality payment for services, and can not be regarded as "ordinary and necessary expenses" within the meaning of sec. 12a of the revenue act of 1916.
6. Such amounts do not become part of the "ordinary and necessary expenses" merely because the payments are made in accordance with an agreement between the taxpayer and its officers.
7. Where the Court of Claims does not make a finding upon the ultimate question of fact upon which the rights of the parties depend, but merely makes findings as to subsidiary circumstantial facts which bear upon it, such findings will not support a judgment unless the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference and may be held to result as a conclusion of law.

Mr. JUSTICE SANFORD delivered the opinion of the Supreme Court January 2, 1929.

UNITED STATES v. CARVER ET AL.

[64 C. Cls. 1; 278 U. S. 294]

Judgment was rendered against the United States in the court below. Upon certiorari the judgment was *reversed*, the Supreme Court deciding:

Respondents' vessel, while at Melbourne, Australia, during the war, and under charter to pick up and transport a cargo of ore from New Caledonia, was denied clearance by Australian authorities at the request of the United States Shipping Board pending the board's decision whether the vessel should be ordered to abandon the charter and return to the United States with a cargo of wheat. In this situation, the respondents accepted a

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charter offered by the United States Food Administration Grain Corporation to carry wheat from Melbourne to New York, having concluded, after negotiations with the Food Administration, that they would better sign the charter rather than have the United States Government take over the vessel. The freight received under the wheat charter was less than would have been received under the ore charter, and respondents sued for the difference in the Court of Claims. *Held:*

1. Clause (b) of the act of June 15, 1917, gave no authority to cancel the contract for the carriage of ore.

2. The act did not provide for compensation to the ship owners for the cancellation of such a contract.

3. The ship owners, by their acts, and not the Shipping Board, made it impossible to perform the ore charter.

4. There was no requisition or taking of the vessel.

5. The Shipping Board did not requisition the ore charter under clause (e) of the act.

Mr. JUSTICE SANFORD delivered the opinion of the Supreme Court January 2, 1929.

CHASE NATIONAL BANK ET AL. v. UNITED STATES

[278 U. S. 327]

In response to questions certified by the Court of Claims in a suit by executors to recover money paid as part of an estate tax the Supreme Court decided:

1. Section 401 of the revenue act of 1921 imposes a tax on "the transfer of the net estate of every decedent" dying after the passage of the act, and sec. 402 provides that in valuing the gross estate from which the net is computed, there shall be included the amount, over an exemption, receivable by beneficiaries as insurance under policies taken out by the decedent upon his own life. After the effective date of the act the decedent in this case procured policies on his life payable to others but reserving to himself the right to change beneficiaries, and paid the premiums until his death. The transfer tax assessed under the act included an amount imposed by reason of the inclusion in his estate of the proceeds of the policies less exemption. *Held:*

(1) This part of the tax is not a direct tax on the policies or their proceeds, but is a tax on the privilege of transferring property of a decedent at death.

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(2) The termination at death of the power of the decedent to change beneficiaries and the consequent passing to the designated beneficiaries of all rights under the policies freed from the possibility of its exercise, is the legitimate subject of a transfer tax.

(3) The fact that the proceeds of the policies were not transferred to the beneficiaries from the decedent, but from the insurer, does not make the tax one on property. The word "transfer" in the statute, and the privilege which may constitutionally be taxed as an excise, includes the transfer of property procured through expenditures by the decedent with the purpose, effected by his death, of having it pass to another.

(4) In reaching this conclusion, it is of some significance that by the local law applicable to the insurer and the insured in this case, the beneficiaries' rights in the policies and their proceeds are deemed to be the proceeds of the premiums paid by the insured, and, as such, recoverable by one having an equitable claim on the premiums.

(5) Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise.

(6) The statutory method of fixing the tax and securing its payment is not objectionable, as arbitrary, under the fifth amendment even though the tax, both on the beneficiaries of the insurance and on those who share in the decedent's estate, is larger than it would be if the insurance proceeds were dealt with separately in taxing their transfer instead of being included in the gross estate from which the net estate, subject to graduated tax rates, is determined.

Mr. JUSTICE STONE delivered the opinion of the Supreme Court January 2, 1929.

REMINGTON ARMS UNION METALLIC CARTRIDGE CO v. UNITED STATES

[63 C. Cls. 544; 278 U. S. 563]

On writ of certiorari. *Affirmed per curiam* October 29, 1928, on the authority of section 177 of the Judicial Code.

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ROXBURGHE v. UNITED STATES

[64 C. Cls. 223; 278 U. S. 598]

Petition for writ of certiorari *denied* by the Supreme Court October 8, 1928.

ZEMURRAY v. UNITED STATES

[64 C. Cls. 657; 278 U. S. 600]

Petition for writ of certiorari *denied* by the Supreme Court October 8, 1928.

CALIFORNIA WINE ASSOCIATION v. UNITED STATES

[65 C. Cls. 7; 278 U. S. 600]

Petition for writ of certiorari *denied* by the Supreme Court October 8, 1928.

NEVADA-CALIFORNIA-OREGON RY. CO. v. UNITED STATES

[65 C. Cls. 75; 278 U. S. 602]

Petition for writ of certiorari *denied* by the Supreme Court October 8, 1928.

FOURTH & CENTRAL TRUST CO., EXECUTOR v. UNITED STATES

[65 C. Cls. 96; 278 U. S. 604]

Petition for writ of certiorari *denied* by the Supreme Court October 8, 1928.

LE CRONE, RECEIVER v. UNITED STATES

[65 C. Cls. 250; 278 U. S. 608]

Petition for writ of certiorari *denied* by the Supreme Court October 8, 1928.

MATTHIESSEN v. UNITED STATES

[65 C. Cls. 484; 278 U. S. 609]

Petition for writ of certiorari *denied* by the Supreme Court October 8, 1928.

JAMES A. SACKLEY CO. v. UNITED STATES

[65 C. Cls. 304; 278 U. S. 609]

Petition for writ of certiorari *denied* by the Supreme Court October 8, 1928.

JOHNSON ET AL. v. UNITED STATES

[65 C. Cls. 285; 278 U. S. 611]

Petition for writ of certiorari *denied* by the Supreme Court October 15, 1928.

MESCE v. UNITED STATES

[64 C. Cls. 481; 278 U. S. 612]

Petition for writ of certiorari *denied* by the Supreme Court October 15, 1928.

CONSOLIDATED GAS, ELECTRIC LIGHT & POWER CO. v. UNITED STATES

[65 C. Cls. 252; 278 U. S. 612]

Petition for writ of certiorari *denied* by the Supreme Court October 15, 1928.

POSTE v. UNITED STATES

[65 C. Cls. 245; 278 U. S. 613]

Petition for writ of certiorari *denied* by the Supreme Court October 15, 1928.

NEW RIVER COLLIERIES CO. ET AL. v. UNITED STATES

[65 C. Cls. 205; 278 U. S. 613]

Petition for writ of certiorari *denied* by the Supreme Court October 15, 1928.

MISSOURI SOUTHERN R. R. CO. v. UNITED STATES

[65 C. Cls. 136; 278 U. S. 614]

Petition for writ of certiorari *denied* by the Supreme Court October 15, 1928.

WALKER MANUFACTURING CO. v. UNITED STATES

[65 C. Cls. 394; 278 U. S. 617]

Petition for writ of certiorari *denied* by the Supreme Court October 15, 1928.

WILLIAM C. ATWATER & CO. v. UNITED STATES

[65 C. Cls. 621; 278 U. S. 618]

Petition for writ of certiorari *denied* by the Supreme Court October 15, 1928.

ROUSE, EXECUTOR, v. UNITED STATES

[65 C. Cls. 749; 278 U. S. 638]

Petition for writ of certiorari *denied* by the Supreme Court October 22, 1928.

COLE STORAGE BATTERY CO. v. UNITED STATES

[65 C. Cls. 164; 278 U. S. 641]

Petition for writ of certiorari *denied* by the Supreme Court October 29, 1928.

MANTLE LAMP CO. v. UNITED STATES

[65 C. Cls. 437; 278 U. S. 641]

Petition for writ of certiorari *denied* by the Supreme Court October 29, 1928.

EVERLASTIK, INC., v. UNITED STATES

[65 C. Cls. 171; 278 U. S. 643]

Petition for writ of certiorari *denied* by the Supreme Court November 19, 1928.

LUPFER ET AL. v. UNITED STATES

[*Ante*, p. 134; 278 U. S. 643]

Petition for writ of certiorari *denied* by the Supreme Court November 19, 1928.

HARDWARE UNDERWRITERS ET AL. v. UNITED STATES

[65 C. Cls. 267; 278 U. S. 645]

Petition for writ of certiorari *denied* by the Supreme Court November 26, 1928.

NYBERG, ADMINISTRATOR, v. UNITED STATES

[*Ante*, p. 153; 278 U. S. 646]

Petition for writ of certiorari *denied* by the Supreme Court November 26, 1928.

MINIS, EXECUTOR, ET AL. v. UNITED STATES

[*Ante*, p. 58; 278 U. S. 657]

Petition for writ of certiorari *denied* by the Supreme Court January 21, 1929.

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CHAPMAN v. UNITED STATES

[63 C. Cls. 424; 278 U. S. 660]

On writ of certiorari. Judgment *vacated* by the Supreme Court October 1, 1928, and cause remanded to the court below with directions to enter judgment for the petitioner, with interest, on motion of the respondent.

LEONARD v. UNITED STATES

[64 C. Cls. 384; 279 U. S. 40]

Judgment was rendered in favor of the United States in the court below. Upon certiorari the judgment was *affirmed*, the Supreme Court deciding:

1. In the act of June 10, 1922, which adjusts the base pay of officers of the Army, Navy, and Marine Corps, according to rank and length of service, the clause in § 1 providing that "For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay," refers only to officers who were in active service on that date.
2. The act to equalize pay of retired officers, approved May 8, 1926, in providing that the pay of officers retired on or before June 30, 1922, shall not be less than that of officers of equal rank and length of service retired subsequent to that date, contemplates that the standard of comparison in each case shall be an officer continually in active service until his retirement after that date, and does not operate to extend to officers retired before June 10, 1922, the benefits of the clause from the act of that date quoted *supra*, par. 1.
3. An officer of the Marine Corps who retired in 1911, and, under the act of March 2, 1903, received longevity pay for his retired service because the retirement was on account of wounds received in battle, *held* not entitled, under the acts of June 10, 1922, and May 8, 1926, to have the years spent by him on the retired list counted in determining his base pay period.

Mr. Justice Stone delivered the opinion of the Supreme Court February 18, 1929.

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UNITED STATES v. NEW YORK CENTRAL RAILROAD CO., LESSEE

[65 C. Cls. 115; 279 U. S. 73]

UNITED STATES v. NEVADA COUNTY NARROW GAUGE R. R. CO.

[65 C. Cls. 327; 279 U. S. 73]

Judgments were rendered against the United States in the court below. Upon certiorari the judgments were *affirmed*, the Supreme Court deciding:

Under the act of July 28, 1916, the Interstate Commerce Commission, in fixing the compensation to be paid by the United States to railroads for services in carrying the mails, has authority to make its order increasing rates operative from the time of the filing of the carrier's petition for increase.

Mr. Justice Holmes delivered the opinion of the Supreme Court March 11, 1929.

INDEX DIGEST

CHARTER PARTY.
Where notwithstanding its lack of the full complement of men required by the charter party on ship's delivery a vessel, on notice by the charterer to sail, proceeded to the Roads and instead of continuing the voyage, as it could have done, there waited for the additional men, the loss of time was not due to a deficiency of men which prevented "the working of or the continuance on the voyage of the vessel," but was incurred through "fault of the ship," and the charterer is entitled to damages accordingly, the measure thereof being the rate of hire for the actual period of detention. *Dampskibsselskabet Norden*, 661.
CONSTITUTION.
Senate bill No. 3185, 69th Congress, 1st session, entitled "An act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," duly passed by both Houses of Congress and presented to the President but not returned by him or at any time approved, was prevented, under Article I, section 7, clause 2, of the Constitution, from becoming a law by the adjournment of Congress before the expiration of 10 days (Sundays excepted) after the bill was presented. Nor does the fact that the adjournment was only of the first session of Congress affect the status of the bill. *Okanogan Indian Tribes et al.*, 26.

CONTRACTS—Continued.

XVII. Where a contract for dredging requires the "removal and disposition of all material encountered, except ledge rock," and defines ledge rock, stating that it "shall not include fragments of rock or boulders capable of being raised by the dredge in one piece," removal by the dredge of pieces of ledge rock incidental to the main operation of dredging other material does not entitle the contractor to extra compensation. *Maryland Dredging Co.*, 627.

XVIII. Where in a contract for Army dredging it is provided that "the findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final," the action of the Comptroller General in refusing payment of items found due by such findings, there being no question of good faith involved, was unauthorized. *Id.*

XIX. A provision in a contract that where any delays in the prosecution or completion of the work are caused by the Government the contractor may have an extension of time if claim therefor is presented within a specified time, applies to the work called for by the original contract, and such claim in the absence of other agreement is not necessary as to work subsequently required. *Plack et al.*, 641.

XX. Where the original contract makes no provision for a change in specifications or additions to the amount of work, the acceptance of orders for such changes or additions together with the price named therein constitutes a new and supplemental contract, and furnishes the contractor no ground for damages due to the necessity of more time or a different period of the year than that required by the original contract. *Id.*

XXI. In a contract with the Veterans' Bureau for remodeling and alterations it was provided that plaintiff was to receive certain material to be salvaged from another building for use under the contract, and plaintiff in his bid made allowance for the use of said material. The salvage material, upon being removed by the Government, was damaged and intermingled with other material, and was not made available to the plaintiff, who was compelled to replace it with new material at an increased cost. *Held*, that plaintiff was entitled to recover the extra cost by reason of being compelled to substitute new material. *Brundage*, 708.

TAXES.

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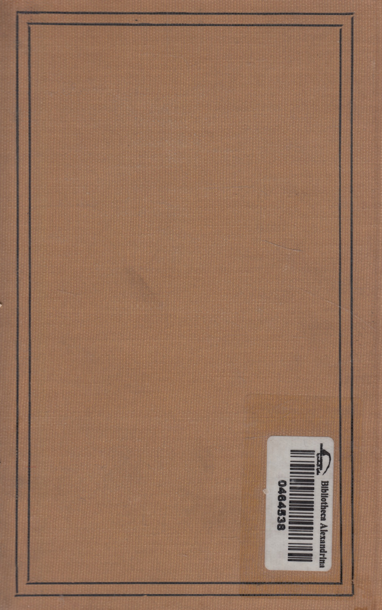











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